91-1514

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, ET AL.,

Appellants,

v.

THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

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March, 1992

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QUESTIONS PRESENTED

1. [Absent] a judicial or administrative finding of racial [discrimination] or previous [disadvantage] in the electorial process and on a record devoid of any such finding or allegation of racial discrimination or disadvantage in the electorial process, does either the Constitution, Section two of the Voting Rights Act, or this Court's decision in Karcher v. Daggett, 462 U.S. 725 (1983) permit, as the divided court below held, a State Legislature to take [affirmative action] in its redistricting process, resulting in the removal of an incumbent white congressman from his present majority black populated district, creating a new safe district for that Congressman and creating an open super majority-minority district through racial

classification of voters [to ensure or to guarantee] the election of a black congressional candidate?

2. Was the divided court below clearly erroneous in holding that this courts decision in White v. Weiser, 412 U.S. 783 (1972) or Karcher vs. Daggett, permit a state legislature to "... give Congressman Hoyer, a congressman with high ranking and importance in the Federal House of Representatives, a "safe seat" to provide the majority black population ... with a chance to chose a representative without requiring that person to run against a strong incumbent such as Congressman Hoyer..." when neither of these cases held that the re-election of incumbents, based on seniority, is a legitimate state goal in congressional redistricting?

3. Are Congressional Representatives [chosen by the people], as required by Article I Section 2 of the Constitution when a State Legislature geographically manipulates people, and classifies voters according to party registration, race, and past voting preference to dictate the outcome of future Congressional elections?

4. Does this court's bedrock mandates in Wesberry v. Sanders, 376 U.S. 1 (1964), Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Sims, 377 U.S. 533 (1964) that a State may not debase or dilute an individuals vote, that fair and effective representation is the admitted goal of redistricting and that full and effective participation requires that each citizen have an [equally effective voice] in the election process, recognize a principle that just as

unequal population dilutes an individuals vote, malapportionment through classification of voters dilutes their right to effectively participate in an election?

THE PARTIES

Appellants in this proceeding are Anne Arundel County Republican Central Committee, Laura Green-Treffer, Anne Arundel County Democratic Central Committee, Kimberly Ann McCoy, Roger W. Moyer, Robert C. Schaeffer and E. Libby Ramsbottom.

Appellees in this proceedings are The State Administrative Board of Election Laws, Winfield M. Kelly, Jr., Secretary of State, and Board of Supervisors of Election of Anne Arundel County.

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CENTRAL COMMITTEE, et al.,

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OF ELECTION LAWS, et al.,

Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MARYLAND

JURISDICTIONAL STATEMENT

In compliance with Rule 18.1, 18.3, and 33 of this Court, Appellants submit this statement particularly disclosing

the basis upon which this Court has jurisdiction on appeal to review the judgment and decision of the United States District Court for the District of Maryland, sitting as a three judge court, entered on December 23, 1991, which declared constitutional legislation enacted by the Maryland General Assembly on October 23, 1991 to redistrict the State of Maryland's eight congressional districts pursuant to the 1990 Census.

OPINIONS BELOW

The reported opinion of a divided three judge court below is set out in Appendix A. District Judges Smalkin and Kaufman comprising the majority and Fourth Circuit Court of Appeals Judge Niemeyer dissenting.

JURISDICTION

This action was initially brought by Appellants Anne Arundel County

Republican Central Committee, Anne Arundel County Democratic Central Committee, political groups, and by, Green-Treffer, McCoy, Moyer, Schaeffer, and Ramsbottom, individual Appellants, challenging the 1991 Maryland General Assembly Reapportionment Act, H.B. 10, under Article I, Section 2 of the Constitution of the United States, under the Fourteenth Amendment to the Constitution of the United States, and under 42 U.S.C. section 1983. Jurisdiction in the court below is based on 28 U.S.C. SS 2284(a), 1331, 1343(3)(4), and 42 U.S.C. section 1983, and venue pursuant to 28 U.S.C. section 1391(b). A three judge panel was appointed pursuant to 28 U.S.C. section 2284. By agreement of both parties, the three judge panel heard arguments in open court on December 13, 1991. The court considered, without objection,

depositions, affidavits, stipulated facts, maps and Census data. On December 23, 1991, a divided three judge court entered its opinion and order. (App. A) A notice of appeal (App. B) was filed in the United States District Court for the District of Maryland on January 21, 1991, its timeliness and the timeliness of this statement being governed by Rule 18.1 and 18.3 of the Rules of this Court.

Jurisdiction of this Appeal is conferred on this Court by 28 U.S.C. section 1253, since the order appealed from involved a judgment rendered by a three judge court.

STATUTES INVOLVED

Article I, Section 2 of the Constitution of the United States provides as follows:

The House of Representatives shall be composed of members chosen every second

year by the people of the several states.

Voting Rights Act of 1965, Section 2 as amended, 42 U.S.C. section 1973(a)(b) provides as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. section 1973(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or

political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. To the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. section 1983 states:

Every person who under color of any statute, ordinance, regulation, custom or usage, of any state or territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On September 25, 1991, a special session of the Maryland General Assembly was convened at the request of the Governor of the State of Maryland, for the purpose of considering and passing Congressional redistricting legislation. The difference in the proposals fostered by the leaders of the Senate and the House of Delegates led to a highly publicized and rancorous dispute. The divisions between the leaders resulted in the proceedings being described by the General Assembly's [own] members as "a zoo", "purely political", "an exercise in self-protection and political greed". Voting sessions and political maneuvering contemptuous of both a fair electoral process and state law resulted in an [unconstitutional]

recess declared by the Speaker of the House of Delegates. Thereafter, the Attorney General of the State of Maryland issued an opinion critical of the Speaker's action and the legislature was reconvened. On October 10, 1991, a joint House/Senate Conference Committee was appointed to resolve the deadlock. On October 18, 1991, after further political infighting, the Speaker again [threatened] to adjourn the House and allow the federal courts to resolve the deadlock.

During the final weekend of the special session of the General Assembly, the Conference Committee met and drafted a redistricting plan known as H.B. 10. While four other plans existed, each with equal or less population variance, and [did not] cause incumbent U.S. Representatives to run against one another, H.B. 10 was the only plan

presented to the General Assembly on October 21, 1991, the last day of the special session. At that time, it was described to members of the Senate by that body's President as "not a good deal but a deal" and it was better that they adopt a plan rather than "let a non-elected federal judge, a non-political person draw a map for us;" to which an unidentified voice cried out from the floor of the Senate: "God help us." Another Senator alleged that the federal courts were not only waiting for the case but that they (the Senators) knew who the judges were that would hear the case. After another rancorous session, the Senate approved H.B. 10 and sent it to the House of Delegates which also approved it. H.B. 10 divided Anne Arundel County, which had previously comprised one congressional district, and its residents and political groups,

into segments of four congressional districts, none of which approach a majority voter population in any district. Under the plan, 239,617 County residents residing on the Western Shore of the Chesapeake Bay, were placed in the Eastern Shore's First Congressional District and joined to their majority population only by a single four mile long bridge. 45,283 County residents were placed in the Second Congressional District also completely separated from the majority by water, so that access requires passage through two other congressional districts. 64,081 County residents were placed in the Third Congressional District; and 78,528 were placed in the Fifth Congressional District. All was done for purely political purposes, i.e., the creation of a new super majority minority district and the

protection of senior incumbent congressmen.

Accordingly, on November 12, 1991, Appellants filed suit in the United States District Court for the District of Maryland alleging that the redistricting plan adopted by the General Assembly had a greater population variance between the largest and smallest districts than did alternative plans which received no consideration and that such deviations were not justified, that H.B. 10 deprived Appellants of an opportunity to effectively participate in the political process and that H.B. 10 represented an unconstitutional gerrymander.

On December 13, 1991, the three judge panel heard the case on the merits through oral argument and consideration of exhibits received by the court on that date. Thereafter on December 23,

1991, a divided three judge court filed its opinion and order declaring H.B. 10 constitutional. The majority of the three judge court, District Judges Smalkin and Kaufman held, while population variances could have been avoided, that creating a super-majority minority voting district and recognizing incumbent representation with its attendant seniority in the House of Representatives were both justified as being within the "aim" or "ambit" of the second prong of Karcher v. Daggett, 462 U.S. 725 (1982) and White vs. Weiser, 412 U.S. 783 (1972) and that Appellants did not show any discriminatory vote dilution under Davis v. Bandemer, 478 U.S. 109 (1986).

To the contrary, Fourth Circuit Court of Appeals Judge Paul V. Niemeyer concluded, in a twenty one page dissent, (App. A) that "the record in this case

shows, and the State concedes, that the delineation of congressional districts was based largely on classifications of voters by how they would vote in order to advance the interests of some existing Representatives, to assure one a "safe seat" at the expense of another, and to serve the political purposes of those involved in drawing the lines. The record shows, and the State also concedes, that racial classifications were made to create a district in which a black candidate would win and to remove the black voters of that district from the "safe seat" intended for another Congressman. The result of drawing lines using such impermissible classifications is the gerrymander depicted on the map attached;" and, he further concluded "that this denied the voters of Maryland a right to make their own choices about reelecting their

present congressman which could not be reconciled with Article I, Section 2, and Wesberry." Accordingly, he stated, he "would not permit an election to proceed on the basis of H.B. 10."

THE QUESTIONS ARE SUBSTANTIAL

I. A state may not take Affirmative Action and create a Super-Majority Minority Congressional Voting District [absent a finding of discrimination.]

A central purpose of the 14th Amendment is to further the Constitutional theme and national goal of equal opportunity among citizens in the exercise of their political rights, and any notion that one racial group, or classification of people, can be granted greater voting strength than another, is hostile to and at war with representative government. This is so

because all legal restrictions which curtail the civil rights of a racial group are immediately suspect and are, by their very nature, odious to a free people whose Constitution is founded upon a doctrine of equality which embodies a principle that neither knows nor tolerates classes among citizens. University of California Regents v. Bakke, 438 U.S. 265, 290-91 and Richmond v. J.A. Croson Co., 488 U.S. 469, 521 and Wesberry v. Sanders, 376 U.S. 1 (1964).

The only context in which this Court has approved the use of racial classification is to [remedy] the effects of a [finding] of past [discrimination]. Even then this Court has applied to [all] government classification by race, whether or not its asserted purpose is remedial or benign, the test of strict scrutiny,

requiring a demonstration of compelling state interest. 488 U.S. 469,493-495 (1988). However, there is [no finding of discrimination] in this case! The question begs an answer in this case. Why was there no finding of discrimination or disadvantage by the divided court below? Why did the State not present any evidence of discrimination or disadvantage which impaired the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and elect candidates of their choice? Thornburg v. Gingles, 478 U.S. 30 (1985). The reason is clear: there was no discrimination or disadvantage. One overriding fact leaps out from the body of evidence: the only reason offered by the State, through oral and written argument, for the extraordinary creation

of a new district was that everyone was [said to assume] that failure to create an open minority district would result in a voting rights lawsuit. Without doubt, assumptions of this type are of no legal value nor can they rise to the level of proof necessary to demonstrate or support a compelling state interest in granting one racial group greater voting strength than another.

By contrast, the plaintiff below did offer uncontradicted evidence that in incumbent Congressman Hoyer's old majority black populated district voters had already elected a black county state's attorney, a white county executive, a white county sheriff, a black county clerk of court, black judges, white judges, and black, white and Asian members to the Maryland General Assembly.

Again, absent a finding of past

discrimination affirmative action that involves racial classification in redistricting has never been held constitutional by this Court. Nor should it, for as Justice Scalia opined in his concurring opinion in Richmond v. J.A. Croson Co., "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation; discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society." 488 U.S. at 521 (1988).

When a state, [without a finding of discrimination,] creates a congressional district that is 68% minority populated and 32% non-minority populated, for no reason other than it [assumed its failure to do so would result in a voting rights lawsuit], it has subjected

to disability that 32% non minority and given advantage to that 68% minority for [no reason] other than [race]. This type of affirmative action has no foundation in reason or the spirit of our Constitution and certainly brings us no closer to a day when race is irrelevant. It only fosters notions of reverse discrimination and visits injustice to a different colored individual.

Likewise, section 2 of the Voting Rights Act offers no remedy, [absent a finding of discrimination or disadvantage], but rather affords "Citizens of all races... an equal chance of electing candidates of their choice..." Senate Report at 193, page 364, U.S. code Cong. and Administrative News 1982, page 364. Nor does the Act establish "a right to have members of a protected class elected in numbers equal to their population. 42 U.S.C. section

1973 2(b).

Thus, in evaluating a claim of vote dilution through districting under section 2 of the Act, a trial court must consider the totality of circumstances and [determine] based upon searching practical evaluation of past and present reality, whether the political process is [equally] open to minority voters. 478 U.S. 30 (1985). This language and logic is echoed in the intentional discrimination case of White v. Register, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). There, in addition to intent, this Court required [proof] that "political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect

legislators of their choice." Id. at 766. See also Whitcomb v. Chavis, 403 U.S. 124, 149 (1971). Clearly then, section 2 of the Act does not guarantee or ensure desired results, or, absent a finding of discrimination, permit a state to take affirmative action to establish a black super-majority minority district. It goes no further than to afford black citizens an equal opportunity to participate in the political process. In this case, there was no searching practical evaluation by the Court, because there was not even an allegation of discrimination let alone evidence that black citizens were not afforded an equal opportunity to participate in the electorial process, but there was [uncontroverted evidence] that blacks [did] equally participate and [did] elect candidates of their choice.

Nor does the State of Maryland's flawed legal and arrant analysis of United Jewish Organization v. Carey, 430 U.S. 144 (1977) permit race conscious redistricting, absent a finding of discrimination or disadvantage in the electorial process. First, this Court in United Jewish Organization, in the only portion in which a majority of the court joined, noted that the Court of Appeals had "observed that this case did not present the question of whether a legislature, [starting afresh], could draw lines on racial basis so as to bolster non-white voting strength, but rather the [narrower question] whether a state could use racial considerations in drawing the lines in an effort to [secure the Attorney General's approval] under the Voting Rights Act, 510 F. 2d 524 "430 U.S. at 154 (Justice White). (emp. sup.) Moreover, in University of

California Regents v. Bakke, the State of California cited United Jewish Organization as a case holding classification by race is constitutional permissible. This Court laid to rest any idea that United Jewish Organization indicated a willingness that voting districts could be drawn to enhance the electorial power of non-white voters absent a finding that voters were the "victim of an unlawful dilution under an original reapportionment plan" by stating: "United Jewish Organizations, like Lau, [properly] is viewed as a case in which the [remedy] for an administrative [finding of discrimination] encompassed measures to improve the previously disadvantaged group's ability to ... meaningful participation in the electorial process." 438 U.S. at 304, 305 (1977). (emp. sup.)

Nor does this Court's decision in Karcher v. Daggett stand for anything more than the conclusion that a state may preserve the voting strength of minorities. However, creating is the antithesis of preserving. The question therefore recurs; absent a finding of discrimination may a State take affirmative action and classify its citizenry by race? The State candidly asserts in its written and oral argument that there is no constitutional prohibition against classification by race and that by passing the Voting Rights Act Congress has approved Affirmative Action in Congressional Redistricting. The majority admits that Karcher does not address the creation of a minority district; however, they believe it is within the "aim" or "sense" of Karcher. This Court must correct these arrant analyses of our

Constitution, the Voting Rights Act and its own prior decisions by clearly mandating that the Constitution as well as the Voting Rights Act rest firmly on the cornerstone of equality for [all] citizens and that a government action that rests on a racial classification is never permissible - except as a [remedy for] and upon a [finding] of a [past] wrong or a [current] injury.

Therefore, if the decision of the divided three judge panel is permitted to stand, without oral argument to and meaningful guidance from this court, the Federal and State judiciary of this country will [assume] this Court has abandoned its prior mandates that a state may not encourage its citizens to vote for a candidate solely on account of race, Anderson v. Martin, 375 U.S. 399, 404 (1963) that preferring members of any one group for no reason other

than race or ethnic origin is discrimination for its own sake and constitutionally forbidden, University of California Regents v. Bakke, 438 U.S. 265, 37 (1977), that societal discrimination is an inadequate basis for race conscious classification and the government only has a compelling interest in favoring one race over another when there is a [finding of past discrimination], Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1988), that the desire to have more blacks within a defined category, standing alone, is insufficiently compelling to justify a racial classification, Id., at 496, that the core purpose of the 14th Amendment was to do away with all governmental imposed discrimination based on race, Palmore v. Sidoti, 466 U.S. 49, 432 (1983). If this be so, let [this court so hold] with clear reason. The

constitutional right involved requires no less.

II. A State may not classify its incumbent U.S. Representative by their term of seniority.

This Court has never squarely decided the issue of whether a State may classify U.S. Representatives in a Congressional Redistricting plan based on their term of seniority, 412 U.S. 783 (1972). In that case, the State of Texas asked this Court to hold that population variances in their congressional redistricting plan were justified as good-faith effort to "promote" constituency-representative relations." 412 U.S. at 791. However, this Court did not reach or decide this issue - "but we need not decide whether this state interest is sufficient to

justify the deviations at issue here, for Plan B admittedly serves this purpose as well as S.B. 1 while adhering more closely to population equality" 412 U.S. 7 at 791, 792.

The Court did explain "in the context of state reapportionment, . . . that the fact that district boundaries may have been drawn in a way that [minimizes] the number of [contests between incumbents] does not in and of itself establish invidiousness.", 412 U.S. 791, See also Karcher at 740; again on page 797 the Weiser Court repeated this same language when it noted that appellees themselves first submitted Plan B (the plan approved by this Court) which followed almost the same district boundaries the state used in its initial plan, S.B. 1.

From this language District Judge Smalkin makes his ill-founded leap in logic that "political classification"

[is not] constitutionally prohibited. The plain fact of this matter is again clear: this Court said no more than "we do not disparage" redistricting plans that [minimize] "contests between present incumbents."

Contrary to White vs. Weiser, in which lines were drawn to preserve and promote constituency representative relations, in the present case there is or was no constituency representative relationship to promote because H.B. 10 removed Congressman Hoyer from his old district and created a new district for him. Therefore, White v. Weiser is not dispositive of this case nor factually apposite to it. Furthermore, H,.B. 10 also does not minimize contests between junior incumbents. To the contrary, it created contests between two junior incumbents in order to protect Congressman Hoyer. However, here as in

White vs. Weiser there was also an alternative plan to H.B. 10, H.B. 22, and H.B. 22 was lower in population deviation, still created a minority district (if that be constitutional), and required no contests between incumbent Congressmen. The state of Maryland candidly opposed this plan because as Circuit Court of Appeals Judge Niemeyer noted in his dissenting opinion at App. A-78:

"The need to draw Representative Hoyer a "new" district arose from the [perceived need] to create a black-majority district in Prince George's County along the northeastern border of the District of Columbia. Hoyer's old district in Prince George's County would well have suited this requirement, but the legislators wanted to "guarantee" the election of a minority candidate and feared that Hoyer would lose if forced

to run in a minority district. As the State explained,

> '[An alternative plan], while creating a minority district, puts a white incumbent in the district. While this may have survived a legal challenge, this plan increases the probability that the State could lose one of its most senior and powerful congressmen. The legislature was at liberty to decide that the possibility of losing Congressman Hoyer was detrimental to the entire state. This plan would also have made it more difficult for a minority to be elected from that district.'

"Overriding desires expressed at the public meeting in Hyattsville, the legislators thus carved the county into two districts. The minority district, District 4, winds through Prince

George's County (conveniently avoiding the residence of Mr. Hoyer) and into southeastern Montgomery County. Consonant with Hoyer's wishes, District 5 includes the remainder of Prince George's County and all of Southern Maryland."

"Ironically, when questioned whether a "new white-majority district" should be created for Hoyer, seventy per cent of the Prince George's County voters polled responded "no." Statewide, sixty-five percent also responded "no." When made aware of these results, however, Senator Pica replied, "[K]nowing Congressman Hoyer's position in the House of Representatives, I would still try to preserve that status in Congress."

"Creating a minority district in which Hoyer would not run prompted the legislators to allocate the remaining seven districts among the eight

incumbent representatives. The final placement of the district boundaries in the center of the State was determined by the decision to eliminate Representative McMillan's former district and pit him, not against Bentley, Hoyer, or Cardin, but against the junior Republican Representative, Wayne Gilchrist, of District 1. Indeed, the precinct in which McMillan resides is the only one in the Crofton area which was included in that portion of Anne Arundel County that was swept across the bay into District 1."

"In light of this evidence, I find that the State did not use neutral criteria to establish its eight congressional districts. Instead, the driving force behind the placement of the new district boundaries was a desire to promote the election bids of certain incumbent representatives at the expense

of other, less senior incumbents. The Constitution gives to the voters of Maryland a right to make their own choices about reelecting their present Congressmen to represent them again in Congress. The State's attempts to defeat that right by manipulating district lines, either by unnecessarily pitting incumbents against one another or by enhancing the prospects of one candidate over another, cannot be reconciled with Article I, section 2, and Wesberry."

To the above Appellant would add three questions, the answers to which will clearly demonstrate why "political classification" is, and must be, constitutionally prohibited. By what doctrine of electoral fairness may a state provide advantage to a politician past the term of office for which he or she was elected by the people? Who is

it that a U.S. Representative represents, the state or the people of the district who elected him/her? And, if a senior representative (and thus his constituents) is granted preference and that preference creates contests between junior representatives (which one incumbent must obviously lose), have the junior representatives [and their constituents] received equal protection of the law?

This Court cannot let stand the clearly erroneous opinion of a divided three Judge panel that interprets White v. Weiser to permit "political classification" of U.S. Representatives based on their seniority, when concededly the Weiser Court clearly stated "we need not decide this issue." This Court must re-visit White vs. Weiser and give meaningful guidance.

III. Article I, section 2 of the U.S. Constitution permits no classification of people in any way which abridges their right to vote.

What the State and two District Judges below failed to recognize, is that this case centers not on the fragmenting of Anne Arundel County, but on diluting the vote of residents and members of political groups within Anne Arundel County, by a state policy that caused congressional district boundaries to be drawn based on race, political affiliation and past voting records of those citizens. This type of State policy must be what the Baker Court had in mind, when it spoke of discrimination reflecting "no policy, but simply arbitrary and capricious action." 369 U.S. 186, at 226 (1962). To hold otherwise is to allow a State to deprive

it's people of fair and direct representation in a manner that condones discrimination. Furthermore, any classification of people designed to impact their right to vote denies those people [equal protection] from invidious discrimination. What rule of reason condones depriving elements of a state citizenry of their ability to effectively participate in the electorial process? Certainly no argument can be advanced by the State that reason exists to give Congressman McMillen more democrats as H.B. 10 does, so that he would have a better chance against Congressman Gilcrest. See Affidavit of Delegate John Gary, App C.

In the present case, 45,000 people from Anne Arundel County were manipulated for this very reason! These 45,000 people are separated by [two] other Congressional Districts (unless

they have a boat) from that Congressional District which they were manipulated [not into but near to]! When questioned about this unique electoral geography, the President of the Senate merely stated: "It's not a good deal, but it's a deal and the cards have been dealt." This is clearly representative of the arbitrary and invidious State consideration that resulted in the classification and manipulation of people, in this case by their own legislators. Can it be that men of reason can not recognize the mandates of common sense? No citizen's right to an effective vote should depend upon a "legislative deal", good or bad! For as this Court has held, when attempting to draw districts of equal population, "the rule is one of practicability, rather than [political practicality."] Kirkpatrick v.

Preisler, 394 U.S. 526, 533 (1969). (emp. sup.)

This Court has held, that "not only can the right to vote not be denied outright, it cannot, consistently with Art I, be destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, or diluted by stuffing of the ballot box. "See United States v. Saylor, 322 U.S. 385 " 376 U.S. at 17 (1963). If one may not alter the ballot box, by what logic or law may one alter or arrange, through "deals", the procedure that leads to the ballot box? As Circuit Judge Niemeyer noted in his dissent: "where the final plan includes shapes that look more like characters on a Saturday morning television program than compact voting districts the court should look behind the plan to question how the legislature arrived at its final decision." Judge Niemeyer did, and

found: "The evidence in this case substantiates the suspicion that these districts were drawn to serve political interests, [a fact conceded by the State at oral argument]." dissenting opinion Appendix A-74. (emp. sup.)

To the contrary, District Judge Smalkin makes no reference to any evidence and [ignores] deposition testimony, affidavits, recorded Senate proceedings and baldly states, [without substantiation,] that "Plaintiff's have not shown any discriminatory vote dilution." What irony for those 45,000 citizens (one example from a record repleat with many) to be told that their person is to be counted only for purposes of equal population, in a district designed to be safe for their opponents, then to be also told that their vote has not been diluted and that they may go to the polls with [equal

dignity] on election day.

Elections, not self-constituted legislatures, are designed to express preference for a U.S. Representative. Classification of people [in any manner] designed to influence the outcome of an election inflicts harm on democracy and representative government. The very idea of democracy embedded in our Constitution forbids representatives from insulating themselves from the people. When a U.S. Representative depends on state legislators to manipulate lines on a map, as in this case, and thereby classify cohorts of voters, to diminish the political efficacy of certain voter's votes, that representative depends [not] on his constituents for his tenure in office but [upon] State legislators. Whatever representation means, it cannot mean that, because the people are then

deprived of their power to constitute the legislature. See The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale Law & Pol. Rev. 301 (1991). But perhaps Judge Smalkin was partially correct in stating that plaintiffs did not show vote dilution. Instead, they far exceeded the definition of dilution by [proving] that their votes were rendered ineffectual and wasted! Small wonder that voters when provided a description of gerrymandering which was not unlike the events which occurred in this case, disapproved of the process by a margin of [82%]. See. Assault on the Gerrymander, Wall Street Journal, December 20, 1989 at A14.

If the decision of the divided court below is permitted to stand, this court will be perceived to have abandoned the

high standard of justice and common sense which resulted in the Wesberry mandate that our Constitution leaves no room for classification of people in a way that unnecessarily abridges the most precious right people have in a free country - their right to vote. 377 U.S. 1 (1963). No more than a modicum of justice or common sense need be applied by this court to mandate that, in the achievement of the goal of equality of population, politicians who classify, arrange and manipulate people advance the work of discrimination in as sinister a manner as that worked by the circumstance of unequal population. Both operate to nullify the voting power of the citizenry.

How can it be argued, with reason, that this arbitrary, invidious and scheming classification of appellants does not deny them an effective

opportunity to influence the political process. Davis v. Bandemer, 478 U.S. 109 (1986).

IV. Malapportionment through classification of voters dilutes their right to effectively participate in an election.

Nothing is more fundamental to representative government than the guarantee of fairness in the process by which we the people choose our representatives. And the right to vote freely for the candidate of our choice, is the essence of our democratic society, and any restrictions on that right, strikes at the heart of our representative government. Reynolds v. Sims, 377 U.S. 533, 555 (1964). Elaborating on the purpose behind this right, the Reynolds Court declared that

full and effective participation by all citizens in government requires each citizen have an [equally effective voice]. Clearly this pursuit of voter equality must recognize that a numerically equal vote is not necessarily an equally effective vote, nor does it result in equal representation. Stated another way, if this Court truly intends to establish equal representation, it must recognize that "just as unequal population dilutes an individuals vote, malapportionment through classification of voters dilutes their right to effectively participate in an election. Viewed in this light classification of voters by party affiliation is no different than classification by race. Either is a violation of the same individual right recognized in Baker, Wesberry and Reynolds - The right to be free of

governmental tampering with one's vote.

The mandate of these cases fosters a rule that the equal distribution of political power was designed to give all voters an equal chance to be heard by their elected representatives. 377 U.S. at 565. While the notion of political equality most often arises in the context of equality of access to the political process, equal distribution of power in a democratic system may only be obtained on the basis of an equally effective vote.

The concept of equally weighted votes therefore,requires more than mere access to the ballot. It requires as well that an electorial system be structured so as to allow all voters a fair chance to influence the process of choosing representatives. Providing for such a fair chance is the only way to provide effective voter participation. Thus,

when a districting plan is based on discriminatory classification of people and voters, those so classified are denied their right to have a fair chance in determining who will represent them, and voting itself then becomes a futile and meaningless gesture, [even if the district is of equal population.]

The prestige and the authority of the Supreme Court derive from mandates predicated upon reason. Clearly, any judicial effort to ensure fair and effective representation through equality of voter district population, [purely a quantitative mandate], must include the additional judicial mandate which speaks to and recognizes the fact that political gerrymandering is a classification, of people which abridges the [qualitative basis] of an individual's right to vote. Previous judicial failures to include such an

additional mandate have been bluntly characterized, to the detriment of the political system and the court, as silly,[1] naive,[2] ridiculous,[3] absurd,[4] senseless,[5] counter productive,[6] sterile,[7] or inane.[8]

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[1] Shapiro, Gerrymandering, Unfairness and the Sup. Ct. 33 UCLA L.Rev. 227, 252 (1985).

[2] Id. at 234.

[3] Backstrom, Problems of Implementing Redistricting, in Representation and Redistricting Issues 43, 46 (Grofman, Lijphart, McKay & Scarrow eds. 1982).

[4] Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77, 113 n.161 (1985).

[5] Howard & Howard, The Dilemma of the Voting Rights Act - Recognizing the Emerging Political Equality Norm, 83 Colum L. Rev. 1615, 1650 (1983).

[6] Dixon, The Warren Court Crusade for the Holy Grail of "One Man One Vote" 1969 Supreme Court L. Rev. 219, 243.

[7] Baker, Whatever Happened to the Reapportionment Revoluation in the United States? in Electoral Laws and Their Political Consequences 257, 274 (Grofman & Lijphart eds. 1986).

After thirty years of judicial eye squinting, this Court recognized political gerrymandering as a justiciable issue in 1986, but could not then muster a majority of Justices of one mind. This case presents issues rich in opportunity from which the Court may articulate meaningful guidance to the Judiciary and to the Bar, while providing legislatures with fair notice of what they must do to stay within Constitutional bounds.

This Court must act to prevent State legislatures from minimizing or cancelling out the voting strength of political elements of the voting population. Gaffney v. Cummings, 412 U.S. 735, 751 (1972).

"The Fifteenth Amendment prohibits a state from denying or abridging a

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[8] Bickel, The Supreme Court and Reapportionment, in Reapportionment in the 1970s 57, 74 (Polsby ed. 1971).

negro's right to vote. The Nineteenth Amendment does the same for women. If a state weighted the male vote more heavily than the female vote or the white vote more heavily than the negro vote, none could successfully contend that the discrimination was allowable." Gray v. Sanders, 372 U.S. 368 (1963) A logical extension to the Court's language would read that a State may not weight the vote of members of one political group more heavily than that of another. This is so because, "... all who participate in the election are to have an equal vote - whatever their race, ...sex, ... occupation, ... income ... "The concept of "We the People," under the Constitution visualizes no preferred class of voters but equality..."372 U.S. 368 (1963).

CONCLUSION

This Court must act to prevent the invidious and arbitrary classification which has been visited upon the appellants, who are black, white, male, female, member and non members of political groups. There is no other recourse, else they and others endure, at a minimum, a decade of unequal and ineffective representation. For the reasons outlined in this statement, and the well reasoned dissent of Circuit Court of Appeals Judge Paul V. Niemeyer, this Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted,

John R. Greiber, Jr. *

*
Counsel of Record

APPENDIX A

OPINION BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, et al.	)	
	)	CIVIL
Plaintiffs	)	
	)	ACTION
v.	)	
	)	NO.
THE STATE ADVISORY BOARD OF ELECTION LAWS, et al.	)	S91-3200
	)	
Defendants	)	

: : : : : : : :

John R. Greiber, Jr., Annapolis, Maryland, for plaintiffs.

Evelyn O. Cannon, Baltimore, Maryland and Robert A. Zarnoch and Kathryn M. Rowe, Annapolis, Maryland, for State Administrative Board of Election Laws and Winfield M. Kelly, Jr.

James C. Praley, Glen Burnie, Maryland, for Board of Supervisors of Election of Anne Arundel County.

Filed: December 23, 1991

Smalkin, District Judge and Kaufman, Senior District Judge:

MEMORANDUM OPINION

Before Niemeyer, Circuit Judge, Smalkin, District Judge, and Kaufman, Senior District Judge.

I. INTRODUCTION

The plaintiffs in this case include citizens residing in Anne Arundel County, Maryland, as well as members of both the Republican and the Democratic party central committees of Anne Arundel County, Maryland. They object to the congressional redistricting plan approved by the Maryland General Assembly on October 22, 1991, following the 1990 Census. They filed suit in this court alleging jurisdiction

pursuant to U.S.C. SS 2284(a), 1331, 1343(3) and (4), and 42 U.S.C. S 1983, and venue pursuant to 28 U.S.C. S 1391(b).

Pursuant to 28 U.S.C. S 2284(a), a three-judge court, consisting of Circuit Judge Paul V. Niemeyer, District Judge Federic N. Smalkin, and Senior District Judge Frank A. Kaufman, was convened by Order of Chief Circuit Judge Sam J. Ervin, III, and heard arguments on the plaintiffs' motion for preliminary injunction and the defendants' motion to dismiss and/or for summary judgment, as well as on the merits of the case (by agreement of both parties), in open court December 13, 1991. The Court has considered exhibits received at that hearing, as well as the parties' stipulated facts. The Court has also considered plaintiffs' three page Post-Argument Summary, delivered to this

Court on December 16, 1991.

This case having been submitted to the Court for determinations of fact and law, we now proceed to state our findings of facts and conclusions of law.

II. FACTUAL BACKGROUND

The population of Maryland was determined by the 1990 Census to be 4,781,468. As a result, Maryland was assigned eight seats in the United States House of Representatives, the same number as it had based on the 1980 Census. Thus, the ideal congressional district would now contain 597,683.5 people.

In May, 1991, the Governor of Maryland appointed a Redistricting Advisory Committee. The task of this committee was to make recommendations on any boundary changes for legislative and congressional election districts made

necessary by shifts in Maryland's population, as indicated by the 1990 Census results. This the committee did, in a plan issued in August, 1991.

The committee soon abandoned this first plan, and approved a second plan on September 19, 1991. The first plan was, however, the basis for a bill introduced in and passed by the Senate of Maryland as Senate Bill 13 on September 25, 1991, the first day of a special session of the state's General Assembly convened for the purpose of redistricting. The committee's second plan was introduced and passed by the House on that same day, as House Bill ("H.B.") 7.

Numerous amendments to these two plans were offered, of which one, a plan offered by Delegate John J. Bishop and designated as H.B. 22, had an overall population deviation of nine people and

an average population deviation of 2.49 people. Another alternative plan, H.B. 10, had an overall population deviation of eleven people and an average deviation of four people.

There followed a prolonged legislative process fraught with political and regional give-and-take, at the end of which H.B. 10 was passed by the Senate on October 21, 1991 and by the House on October 22, 1991. Since the time of that plan's introduction, its population deviation had been improved to a maximum of ten people and an average of 2.75 people.[1] The bill was signed into law

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[1] At trial and for our purposes here, the numerical devia-tions in H.B. 10 were calculated based upon the Maryland Attorney General's interpretation of the bill, as it should be read in order to correct a drafting error. (See State's Mem. of Law at 9-10; Stipulations of Fact 85.) Plaintiffs do not take issue with this reading of the bill. The population deviation in H.B. 10, broken down by congressional district, is as follows:

by the Governor on October 23, 1991, and this lawsuit quickly followed.

The plaintiffs allege that the Maryland General Assembly failed to make a good-faith effort to achieve numerical equality among the right new congressional districts, and, in fact, that H.B. 10 was adopted with the discriminatory intent to "deprive the plaintiffs of an opportunity to effectively participate in the political process," in violation of their rights under Article 1, S 2 of the United States Constitution. (Plaintiff's Compl., at 19.) The plaintiffs also allege that H.B. 10 represents an unconstitutional "gerrymander." At the

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District 1	+ 1
District 2	0
District 3	- 3
District 4	+ 7
District 5	+ 1
District 6	+ 5
District 7	- 3
District 8	- 1

heart of the plaintiffs' argument is that Anne Arundel County, the State's fourth most populous county and formerly part of the State's Fourth Congressional District, has been divided by H.B. 10 among four separate congressional districts, thus "diluting" the votes of the residents.

3. ANALYSIS UNDER KARCHER

Article I, S 2 of the United States Constitution provides that the members of the House of Representatives will be chosen "by the People of the several States," with equal representation for equal numbers of people. Wesberry v. Sanders, 367 U.S. 1, 7-8 (1963). This Constitutional mandate "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Id. Consequently, congressional districts are to be apportioned to achieve

"precise mathematical equality." Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

The Supreme Court's most recent pronouncement concerning Article I's "one person, one vote" requirement is found in Karcher v. Daggett, 462 U.S. 725 (1983). Karcher sets forth a two-part test for considering the legal significance of population deviations in a state legislature's apportionment of congressional districts. First, those challenging a redistricting plan for alleged failure to comply with Art. I, S 2 bear the burden of proving that "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." Id. at 730. If the opponents of a redistricting plan "can establish that the population differences were not

[unavoidable nor] the result of a good-faith effort to achieve equality," then the burden shifts to the state. In this second step, the state must prove that "each significant variance between districts was necessary to achieve some legitimate goal." Id. at 731. The State's justification for contested numerical disparities must be made "with particularity." Id. at 739.

Here, the defendants argue that the deviation from absolute numerical equality present in H.B. 10 is too trivial to rise to a constitutionally significant level. (State's Mem. In Supp. of State's Opp'n to Mot. for Prelim. Inj. and State's Mot. to Dismiss and/or for Summary Judgment at 14-15) Claiming that the variations from absolute equality are "unavoidable," the defendants seemingly contend that H.B. 10 represents a good- faith effort to

achieve population equality, satisfying Art. I, S 2, and the first prong of Karcher, thus making it unnecessary for this court to each the second prong of Karcher. In addition, however, the defendants assert that if the second prong of Karcher is reached, they have met their burden thereunder.

We disagree with the defendants as to prong one of Karcher. While it is true that the deviation herein is very small, Karcher specifically holds "that there are no de minimis variations which could practically be avoided, but which nonetheless meet the standard of Art. I, S 2 without justification." Karcher, 462 U.S. at 734 (emphasis added). "Art. I, S 2 . . . permits only the limited population variations which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown." Id. at

730 (quoting Kirkpatrick, 394 U.S. at 531 (emphasis added)). Justification, however, "belongs more properly to the second level of judicial inquiry . . . in which the State bears the burden of justifying the [statistical] differences with particularity." Id. at 739.[2]

In the present case, H.B. 10 has an average variance among Maryland's eight congressional districts of 2.75 people, while H.B. 22 has an average variance of 2.49 people. (Stipulations of Fact paras. 77 and 84.) Given the existence of H.B. 22, a plan with a smaller numerical deviation from absolute

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[2] Recently, a three-judge district court in Illinois, Hastert v. State Board of Elections, ___ F. Supp. ___ (N.D. Ill. 1991), 1991 W.L. 228185, Nos. 91 C 4028, 91 C 4154, 91 C 4643, 91 C 5472, applied Karcher in an Art. I, S 2 congressional redistricting case. The Hastert court concluded that, under Karcher, there is no acceptable departure from absolute numerical equality among congressional districts which will insulate a proposed redistricting plan from further scrutiny.

equality, plaintiffs have proved that H.B. 10's deviations did not result from an unavoidable good faith effort to achieve population equality. Thus, we disagree with defendants and hold that the mathematical variations in this case, even though relatively small, enable plaintiffs to satisfy Karcher's first prong and shift to the State the burden of proving justification under prong two of Karcher:

> The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of

> alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.

Karcher, 462 U.S. at 741 (emphasis added).

It is under Karcher's second prong that we now consider the relatively insignificant mathematical deviations in this case. We note that the amount and degree of justification which the State must establish is roughly equatable to the deviation itself. In that light, we consider the aims of the State of Maryland which have caused it to enact the particular congressional

redistricting plan before us.

In Karcher, Justice Brennan provided guidance for the determination of what state objectives might justify deviations from numerical equality among the congressional districts:

> Any number of consistently applied legisla-tive policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, . . . these are all legitimate objectives that on a

> proper showing could justify minor population deviations.

Id. (citations omitted).

Both in the evidence presented and in oral argument, the State has set forth several convincing, consistent, and legitimate justifications for the numerical deviations within H.B. 10.[3] These include: (1) keeping intact the three major regions that surround the center of the state (specifically, the Eastern Shore, Southern, and Western Maryland), (2) creating a minority voting district, and (3) recognizing incumbent representation, with its attendant seniority, in the House of

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[3] See The Supreme Court, 1982 Term--Leading Cases, 97 Harv. L. Rev. 70, 141 (1983), suggesting that Karcher teaches that such justifications are to be considered flexibly by the courts.

Representatives.[4] (See State Mem. in Opp. at 23-28, see also the dissenting opp. hereto, at 38-41). We conclude that these justifications, which the State alleges are properly within the ambit of a state legislature's redistricting latitude and designed to achieve legitimate state goals, are sufficient to warrant the very small numerical variance among the congressional districts seen here. The analysis mandated by the Supreme Court cases applying Art. I, S 2 is, therefore, satisfied.

The dissent takes the position that Karcher's numerical analysis is merely the beginning at the Art. I, S 2 inquiry. As we read the dissent, no state "classification" of "the people" (apparently a broader category than

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[4] See White v. Weiser, 412 U.S. 783, 791 (1972).

voters) that is the product of any political consideration is constitutionally justified. Only "neutral" classifications, such as natural geographic barriers, points of the compass, or, perhaps, historical municipal and county subdivision boundaries, are to be considered by the legislature as it apportions its population for the House of Representatives. In short, the dissent would appear to advance a position that would hold unconstitutional any redistricting plan that was in any way affected by considerations that could be labelled "political."

In Karcher's footnote 6, Justice Brennan noted that Kirkpatrick's and Karcher's mandate for population equality among congressional districts alone would do "little to prevent what is known as gerrymandering." 462 U.S.

at 734. Of course, nothing prevents the plaintiff/opponents of a redistricting plan from challenging that plan on constitutional grounds either inside or outside of Art. 1, S 2. Any prohibited classification of or distinction among "the people" is still cognizable, for example, under the rubric of the First and Fourteenth Amendments. See, e.g., Davis v. Bandemer, 478 U.S. 109 (1986).[5] The protections provided within Art. 1, S 2 speak for themselves. Further, the protections provided by the First and Fourteenth Amendments, as well as by many other parts of our Federal Constitution, provide a backstop to the "one person, one vote" requirement in Art. I, S 2. Moreover, as Justice Brennan recognized in footnote 6 of Karcher, state constitutional and

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[5] See discussion post at 13.

statutory provisions also serve a similar backstopping purpose.

The idea that Art. I, S 2 prohibits taking any "political" factors into account is flatly contradicted by the language in Karcher itself:

> We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time.

462 U.S. at 739. Nor is such a discussion unique to Karcher. The Supreme Court has long recognized the appropriateness of political considerations within the redistricting

process. In White v. Weiser, 412 U.S. at 794, the Court noted that "from the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination . . . . " Indeed, the Court there recognized and "d[id] not disparage" the state defendants' policy of promoting:

> " 'constituency-representative relations,' a policy frankly aimed at maintaining existing relationships between incumbent congressman and their constituents and preserving the seniority the members of the State's delega-tion have achieved in the United States House of Representatives."

Id. at 791. Surely, such language does

not recognize any command in Art. I, S 2 that "political" classifications cannot be made during redistricting.

As Justice Brennan has made clear, the Supreme Court is willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts.

Karcher, 462 U.S. at 740 (emphasis added).

In this case, this Court defers to Maryland's legislature. The evidence, as the dissent states, shows that the General Assembly, inter alia, aimed to give Congressman Hoyer, a congressman with high ranking and importance in the federal House of Representatives, a "safe seat," to provide the majority black population in an area of Prince George's and Montgomery counties with a

chance to choose a representative without requiring that person to run against a strong incumbent such as Congressman Hoyer, and to provide certain opportunities for Congressman Bentley and Congressman Cardin. Dissenting Opp. at 18-21. The reelection of incumbents as such was not listed specifically by Justice Brennan in Karcher as an example of an affirmative legislative justification sufficient to meet Karcher's second prong, though recognized in White v. Weiser. Neither is the establishment of a majority black district listed specifically in Karcher, but "preserving the strength of racial minority groups" is discussed. Karcher, 462 U.S. at 742. These aims, however, are clearly within Karcher's ambit. While Justice Brennan there concluded that the District Court's finding of a lack of causal

connection between racial voting aims and the redistricting plan at issue was not "clearly erroneous," id. at 743, the sense of Karcher strongly suggests that if, as here, such a causal connection does exist, such aims can constitute an appropriate Karcher second-prong basis.

We also note that the "neutral criteria" redistricting called for by the dissent would in no way ensure maintenance of the territorial integrity of Anne Arundel County, which is what brought on this suit in the first place. Rather, adoption of the dissent's position would potentially subject every congressional district in the United States to novel constitutional scrutiny. Furthermore, to mandate that a legislature reapportion with regard merely to "neutral criteria" (except for the dictates of the Voting Rights Act and the Fifteenth Amendment) is to give

that legislature, in practice, no guidance at all. Indeed, it virtually guarantees that a federal court, in a sort of judicial receivership, will ultimately conduct redistricting--a process the Supreme Court has consistently recognized as political.[6]

IV. OTHER CONSTITUTIONAL CONSIDERATION

Plaintiffs also contend that H.B. 10 represents an unconstitutional "gerrymander," and therefore that the Maryland General Assembly has discriminated against them, in violation of the Equal Protection Clause of the

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[6] We note that during the Maryland Senate Proceedings on October 21, 1991, the following colloquy took place:

PRESIDENT MILLER: We labored mightily, the majority leader and the chairman and myself, and we made a conscious decision that it was better that we adopt this plan with these modifica-tions than let a nonelected federal judge, a non-political person draw a map for us.

VOICE: God help us.

Pls. Ex. 17 at 80-81.

Fourteenth Amendment. In support of their position, plaintiffs cite Davis v. Bandemer, 478 U.S. 109 (1986), in which the Court held that gerrymandering for political purposes is justiciable under the Equal Protection Clause of the Fourteenth Amendment.[7]

What plaintiffs have presented in this instance is not a case of political gerrymandering as seen in Davis. The Court in Davis limited its holding--that political gerrymanders are justiciable--to cases involving partisan bias. "[E]ach political group in a State should have the same chance to elect represen-tatives of its choice as any other political group." Davis, 478 U.S. at 124. Where a legislature

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[7] As a threshold issue, we note that in Davis the Supreme Court was called upon to address a challenge to the partisan redistricting of the Indiana legislature, not to congressional redistricting.

intentionally draws lines "to afford political groups in various districts an enhanced oppor-tunity to elect legislators of their choice . . . 'we must . . . respond to [the] claims . . . that even if acceptable population-wise, the . . . plan was invidiously discriminatory because a 'political fairness principle' was followed.'" Davis, 478 U.S. at 124-25 (quoting Gaffney v. Cummings, 412 U.S. 735, 751-52 (emphasis in original)). Thus, in Davis, the Supreme Court only reached the question of whether, where one political party makes a claim of discrimination during redistricting, the issue is justiciable.

In the case before this Court, the plaintiffs represent both the Anne Arundel Democratic and Republican parties. The type of partisan discrimination treated in Davis

apparently has not occurred here. Indeed, the plaintiffs contend that the discrimination which they suffer as a result of H.B. 10 stems from the effect that the division of Anne Arundel County has on the plaintiffs' ability to "effectively participate as a [group] and thereby influence the elective process and to secure the attention of the winning candidate." (Plaintiffs' Mem. in Opp. to State Defendants' Mot. to Dismiss And/Or Mot. for Sum. Judg. at 35.) In essence, therefore, the plaintiffs contend that they, as Anne Arundel County voters, have some form of constitutionally significant community interest which will be diluted if H.B. 10 goes into effect.[8]

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[8] Anne Arundel County is not the only County divided by HB 10. Others include Montgomery, Howard and Prince George's, all divided between two districts, and Baltimore City and Baltimore County, each divided among three districts.

Assuming justiciability and reaching the merits,[9] this federal court must keep in mind that the voice of the people of Maryland is most directly heard through the General Assembly of Maryland. While the interests of "the people," as the dissent emphasizes, predominate, the "people" of the State of Maryland cannot in 1991, even if they could have so done in 1789, practically be heard individually *via* a state-wide town meeting of the whole. The most direct channel of action by the "people" is *via* their elected representatives in

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[9] The standard for establishing justiciability is well settled. *See* *Baker v. Carr*, 369 U.S. 186 (1961). The court in *Baker* elucidated a three-part test: (1) the issue must not be more properly decided by a coequal part of government, (2) there must be no risk of foreign or domestic disturbance or embarrass-ment, and (3) there must be judicially discernible and manageable standards by which the case can be decided. *Id.* at 266. Both the second and third prongs of this test give us pause in this case.

both houses of Maryland's legislature--a branch of our total governmental structure, as is this Court. A federal court, in scrutinizing a congressional redistricting plan, should therefore think long and hard about rejecting the reasons--the justifications--of the state legislature.[10]

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[10] In keeping with the dissent's historical analysis, we note that gerrymandering was not conceived out of the blue in this country. The "rotten borough"--one that had few electors or voters--was a similar concept and one that long plagued the English. A rotten borough was used to give a seat in Parliament to a person whom a political party wished to reward, albeit often a very able person.

Pocket boroughs, in which the member of parliament could purchase his seat, similarly diluted the vote of the people whom he represented. Representative of the attitude that such politicians had toward their electorate is the following:

> The following letter was written by Anthony Henley, Member of Parliament for Southampton from 1727 to 1734, to his constituents who had protested to him about the Excise Bill:

It is in such context that we consider and reject the plaintiffs' challenge to what they label as unconstitutional gerrymandering. We do not, as the dissent suggests, believe that there are

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Gentlemen,

> I received yours and am surprised by your insolence in troubling me about the Excise. You know, what I very well know, that I bought you. And I know, what perhaps you think I don't know, you are now selling yourselves to Somebody Else; and I know what you do not know, that I am buying another borough. May God's curse light upon you all: may your houses be as open and common to all Excise Officers as your wifes [sic] and daughters were to me, when I stood for your scoundrel corporation.

Yours, etc.,

Anthony Henley

John Julius Norwich, Christmas Crackers 93 (1986).

Rotten boroughs and other electoral anomalies were eliminated by Parliament, not by judicial decree, in the Reform Act of 1832. See generally 13 William S. Holdsworth, A History of English Law 239-59 (1952).

no limits upon gerrymandering. We do not hold that the State is correct in conceding that under its interpretation Article I, S 2, would not be violated by a district line drawn to snake through the alleys and cul-de-sacs of 23 different counties in order to match two white people for each black, or two democrats for each republican, for the purpose of advancing the chances that the favored class would win an election while diluting the vote of the unfavored class.

Dissenting Op. at 21. We do not have that specific example before us and therefore do not reach it.[11] If the

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[11] What constitutes political gerrymandering going so far beyond the pale as to be unacceptable in our federal constitu-tional setting is hard to define. But as Justice Stewart once wrote about pornography, most of us "know it when we see it." See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). We can well afford, as Justice Brennan, writing in Karcher seems to have had in

territorial of Anne Arundel County is a classification--a proposition we doubt,[12] but also do not reach--it, like all classifications, must have a reasonable basis in fact, even if no suspect criterion such as race, religion, sex or the like is involved.

Underpinning the dissent appears to be the proposition that, independent of Karcher and of the numerical "one person-one vote" doctrine, political gerrymandering can be so egregiously unbearable that it cannot pass federal constitutional muster. We do not, and need not in this case, question that position. See, e.g., Karcher, 462 U.S. at 744 (Stevens, J., concurring); Daniel D. Polsby & Robert D. Poppa, The Third

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mind, leaving to another day and to another case the task of establishing federal constitutional limits to gerrymandering in congressional districting.

[12] See supra at 14.

Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale Law & Pol. Rev. 301 (1991). As Justice Brennan has noted, "[a] federal principle of population equality does not prevent any State from taking steps to inhibit gerrymandering, so long as a good-faith effort is made to achieve population equality as well." Karcher, 462 U.S. at 724 n.6.

The dissent may be suggesting that political considerations which constitute appropriate justifications under Karcher's second prong somehow violate Art., I, S 2, or other federal constitutional mandates, or both. The answer to any such approach, however, is that the Supreme Court would hardly have put its stamp of approval on a justification under Karcher's second prong, if such justification were constitutionally invalid for any other

reason. In any event, a federal court is not prevented from granting relief under any available federal constitutional provision if gerrymandering violates it, and if the matter is justiciable. The point is that carving Anne Arundel County into four pieces--while perhaps enough to raise eyebrows--does not violate any federal constitutional provision, including the mandate of Art. I, S 2, to give full effect to the voice of the "people."

Furthermore the plaintiffs have not shown any discriminatory vote dilution. See Davis, 478 U.S. at 143. Nothing the plaintiffs have presented to this Court indicates that their vote will necessarily be any less powerful in any of the four congressional districts in which they will now reside. Nothing prevents the plaintiffs from joining the

local organizations of the political parties of their choice and having whatever power they had previously to influence the political process. Thus, assuming arguendo that they present a justiciable issue, the plaintiffs fail to make a Davis showing of vote dilution.

Plaintiffs' claim also fails under a First Amendment analysis. Nothing about H.B. 10 affects in any proscribed way the plaintiffs' ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves. They are free to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.

To the extent that plaintiffs--and any of their follow Anne Arundel Countians--

are legitimately distressed by H.B. 10, they have suffered a political setback, but not a violation of their federal constitutional rights, through the action of "the people" as expressed by the directly elected representatives of "the people" of Maryland.

Based upon the principles articulated herein in the context of the evidence presented in this case, this Court concludes that the State defendants, on the merits, are entitled to judgment in their favor. Accordingly, judgment will be entered in their favor, by a separate order.

/S/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

/S/ Frank A. Kaufman
FRANK A. KAUFMAN
Senior United States District Judge

Date: _____

NIEMEYER, Circuit Judge, dissenting:

The Maryland legislature, using data about voters' political party registrations, their past voting habits, and their race, drew congressional district lines to depict the classic gerrymander in an attempt to control the outcome of future congressional elections. Because the use of such classifications in drawing district lines favors one class and of necessity dilutes the vote of another, the people are not represented directly and equally, as required by Art. I, S 2, of the United States Constitution.

I concur with the conclusion reached by the majority that the requirements of Karcher v. Daggett, 462 U.S. 725 (1983), have been satisfied by H.B. 10 in that each of the eight congressional districts created by it has, for all practical purposes, an

equal population. I would not even find it necessary to pass from step one to step two of the Karcher analysis. Step one requires a determination of whether a good faith effort was made to divide the state into districts equal in population. Only if there is a "significant variance" between districts must step two be reached, which requires that the state justify the variance. Id. at 731. In this case the greatest variance from the "ideal" district is seven persons. No policy or consideration, in my judgment, is served by shifting three or four persons from one district to another or needs to be advanced for failing to shift them.

The major failing, I respectfully submit, of the majority opinion is its acceptance of the position advanced by the State that once the requirements of Karcher are satisfied, the analysis

ends. In other words, the majority holds that Karcher establishes a per se rule that once equality of numbers is achieved, no further analysis is appropriate to determine whether the requirements of Article I, S 2, have been met, even if the state's motive in establishing district lines were found to be invidious and the effect of its delineation were found to be the total dilution of the vote of a recognized class of people or voters. That position leads to the conclusion that politically or racially drawn lines, however gerrymandered, cannot violate Article I, S 2. The State thus conceded at oral argument that under its interpretation, Article I, S 2 would not be violated by a district line drawn to snake through the alleys and cul-de-sacs of 23 different counties in order to match two white people for each black,

or two democrats for each republican, for the purpose of advancing the chances that the favored class would win an election while diluting the vote of the unfavored class.

While Karcher appropriately addresses vote dilution created by numerical inequalities among districts, it was never intended to overrule the other Supreme Court holdings, such as Wesberry v. Sanders, 376 U.S. 1 (1964), which recognize the Constitution's prohibition against vote dilution by any classification and require that representation of the people be direct and equal. Karcher decided only the issue of when a variance in population among districts can be justified. The majority extends this limited holding to conclude that Article I requires nothing more than population equality. But in response to this dissenting opinion, the

majority concedes "we do not . . . believe there are no limits upon gerrymandering" imposed by Article I. Recognizing the difficulty of making that concession, because gerrymandering "in our federal constitutional setting is hard to define," the majority concludes that "most of us 'know it when we see it'" (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (attempting to define pornography). Without acknowledging that our founding fathers intended to avoid duplicating the "rotten boroughs" problem of London, not by relying on state legislatures, but in adopting Article I to provide direct and equal representation of the people, see Debates in the Federal Convention of 1787 as Reported by James Madison 202 (James McClellan & Melvin E. Bradford eds., 1989) [hereinafter Elliot's

Debates] (statement of James Wilson; id. at 207-08 (statement of James Madison), the majority recognizes the prohibition against gerrymandering, but only when it subjectively defines it as such.

In defending its plan on the contention that the states are free to draw district lines in any way they see fit, so long as each district includes the same number of people, the State fails to recognize that this case centers, not on a reapportionment of the Maryland legislature, but on the effectuation of the people's election of their Representatives in Congress. The distinction is both clear and critical. "There are fundamental differences between congressional districting under Art. I and the Wesberry line of cases on the one hand, and, on the other, state legislative reapportionments." Gaffney v. Cummings, 412 U.S. 735, 741-42

(1973). Despite arguments by the State to the contrary, a state's role in constituting a House of Representatives is limited by federal law to establishing the "time, place and manner" of elections and to sending Representatives to Congress from districts that provide a "direct and equal" representation of the people, all of them. To accomplish that purpose no classification of the people can be made to advance the state legislature's preference for one class to the detriment of another, and clearly the state may not attempt to dictate the outcome of congressional elections.

In this case the record shows, and the State concedes, that the delineation of congressional districts was based largely on classifications of voters by how they would vote in order to advance the interests of some

existing Representatives, to assure one a "safe seat" at the expense of another, and to serve the political purposes of those involved in drawing the lines. The record shows, and the State also concedes, that racial classifications were made to create a district in which a black candidate would win and to remove the black voters of that district from the "safe seat" intended for another Congressman. The result of drawing lines using such impermissible classifications is the gerrymander depicted on the map attached.

A prohibition of Article I against classifications that are based on how the voters voted and can be expected to vote, for the purpose of steering the outcome of an election, does not, as the majority suggests, fail to recognize the political process inherent in every legislative act. Any

legislative act is "political" to the extent that each legislator votes on the basis of personal philosophy, constituency, and the desire to be reelected. That is far different than a law enacted by the legislature which is designed to manipulate an election outcome out of fear that neutral criteria would permit the people to vote otherwise.

Because drawing lines that purposefully advance on political interest of necessity dilutes the opposing interest and therefore violates Article I, S 2, of the Constitution, I would not permit an election of Representatives to Congress to proceed on the basis of H.B. 10.

I

The legislative power of the United States is vested in a bicameral legislature, one body of which, the

House of Representatives, is intended to represent the people of the several states, and the other, the Senate, as originally intended, to act as a representative body for the states themselves. See U.S. Const. Art. I, SS 1, 2 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.") As described by James Madison in The Federalist No. 39,

> [t]he House of Representatives, like that of one branch at least of all the State Legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress, and the Senate of

> Maryland, derives its appointment indirectly from the people.

An important distinction is thus deliberately made between the states and the people.

The framers debated long whether the states should act as political agents for the people in selecting members of Congress, or whether instead the people deserve and require direct representation in the federal legislature. "While those who wanted both houses to represent the people had yielded on the Senate, they had not yielded on the House of Representatives. William Samuel Johnson . . . had summed it up well: 'in one branch the people, ought to be represented; in the other, the States.'" Wesberry, 376 U.S. at 13 (quoting 3 The Records of the Federal Convention of 1787 462 (Farrand ed. 1911) (emphasis in original)). Argument

centered not only upon the appropriate method of ascertaining and distributing the relative power of representation among the states, but also, perhaps as importantly, upon the appropriate structure for assuring that the people, and not the state legislatures, achieve meaningful representation in the federal legislative body.

Article I, which is the outcome of that debate, clearly establishes the House of Representatives not only as a means for ensuring a distribution of political power on the federal level which corresponds to the relative populations of the states, but also as the body that is intended to represent the people and not the states. See Elliot's Debates at 75 ("Mr. Madison considered an election of one branch at least of the Legislature by the people immediately, as a clear principle of

free [Government] and that this mode under proper regulations had the additional advantage of securing better representatives, as well as of avoiding too great an agency of the State Governments in the General one.") (emphasis added); id. at 39-45 (reporting that some delegates disfavored popular election of the first branch of the legislature, while others, including Mr. Mason and Mr. Wilson argued strongly for an election of the larger branch of the legislature by the people); Wesberry, 376 U.S. at 14 ("The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality

. . . .").

The deliberate and careful distinction thus made in the House of Representatives for representation of

the people and not the state legislatures is preserved throughout the provisions establishing the House of Representatives and regulating its membership. Even the question of who voted for members of the House of Representatives was not the ultimate question, so long as whoever was entitled to vote represented the people. Reasoning from a principle that the state governments had already been constituted by the people and from a desire to harmonize voting privileges in the given States so that voter qualifications would be similar to state and federal elections, the founders carefully bypassed state legislatures and tied the right to vote to the provisions in each state constitution providing voting rights for its largest legislative house. Some were concerned with the problems which might arise from

the establishment of differing qualifications for federal and state elections. See Elliot's Debates at 382 ("It would be very hard & disagreeable for the same persons at the same time, to vote for representatives in the State Legislature and to be excluded from a vote for those in the [National] Legislature.") (statement of Mr. Wilson). But most delegates primarily feared putting power to modify elector qualifications in the hands of either the state or the federal legislature. "The right of suffrage was a tender point, and strongly guarded by most State Constitutions." Id. at 383 (statement of Mr. Elseworth). Colonel Mason from Virginia agreed: "A power to alter the qualifications would be dangerous power in the hands of the Legislature." Id.; see also id. at 385 ("A gradual abridgment of [the right of

suffrage] has been the mode in which Aristocracies have been built on the ruins of popular forms.") (statement of Mr. Madison). In the end, it was determined that the right of suffrage must be left ultimately to neither state nor federal legislatures, but to the people. Thus the ability to vote for members of the House of Representatives was tied to the existing qualifications, fixed by state constitutions, for the most numerous body of the state legislatures. See U.S. Cont. Art. I, S 2, cl. 1. As noted in The Federalist No. 52 (James Madison),

> [t]he provision made by the convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established or which may be

established by the State itself. It will be safe to the United States; because, being fixed by the State Constitutions, it is not alterable by the State Governments, and it cannot be feared that the people of the States will alter this part of their Constitutions, in such a manner as to abridge the rights secured to them by the Federal Constitution.

(emphasis added).

Only in setting the time, place and manner of elections did the framers expressly defer to state legislatures, and then only with the reservation to the federal government of ultimate power on the issue. Article I, S 4, cl. 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof;

but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." See also Elliot's Debates at 403 ("[T]he Legislatures of the States ought not to have the uncontrolled right of regulating the times places & Manner of holding elections . . . . It was impossible to foresee all the abuses that might be made of the discretionary power.") (statement of Mr. Madison); id. at 404 ("If this power be not given to the [National] Legislature, their right of judging of the returns of their members may be frustrated.") (statement of Mr. King).

There can be no question that the issue of determining the method of selecting members of the House of Representatives is uniquely and exclusively a federal question, with only a limited role given to the states.

See Ex Parte Yarborough, 110 U.S. 651, 663 (1884) ("It is not true . . . that electors for members of Congress owe their right to vote to the State law . . . . "); United States v. Classic, 313 U.S. 299, 315 (1941) ("While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by S 2 of Art. I . . . . .") (citations omitted). The Constitution finally summarizes the supremacy of the federal role when it provides that each House of Congress is responsible for judging elections and the qualifications of its members. See U.S. Const. Art. I, S 5, cl. 1. And no exception is made for determining the size, location, and configuration of

congressional districts. These must conform to the principle of establishing direct representation of the people, as required in Article I.

Article I makes no requirement that members of Congress represent districts within a state, so long as the number allocated to a given state is determined by population. Congress did for many years mandate and actively regulate congressional districting, but since 1929 it has assumed a less active role in that regard. See Wesberry, 376 U.S. at 42-44 (Harlan, J., dissenting). This leaves to the states that role, but always in service to the federal government and the people in accordance with the federal Constitution. Cf. White v. Weiser, 412 U.S. 783, 797 (1973) ("Of course, the District Court should defer to state policy in fashioning relief [in congressional

redistricting case] only where the policy is consistent with constitutional norms and is not itself vulnerable to legal challenge.").

When a state divides itself into districts, the division must preserve the representation of the people, directly and without interference by any agency of the state legislature. The direct representation of the people inherently requires that all the people of a state be represented, and to accomplish that goal the representation must be equal. This theme, that the representation of the people in the House of Representatives must be direct and equal, was recurring and consistent in the debates of the framers, and was adequately and early summarized by Justice Story:

> We accordingly find, that in the section under consideration, the

> house of representatives is required to be composed of representatives chosen by the people of the several states. The choice, too, is to be made immediately by them; so that the power is direct; their influence direct; and the responsibility direct. If any intermediate agency had been adopted, such as a choice through an electoral college, or by official personages, or by select and specially qualified functionaries pro hac vice, it is obvious, that the dependence of the representatives upon the people, and the responsibility to them, would have been far less felt, and far more obstructed.

Joseph Story, Commentaries on the Constitution of the United States S 292 (1833) (emphasis added). In a detailed analysis of Article I, the Supreme Court

reached the same conclusion in Wesberry. Reciting the debates, the Supreme Court stated that "the House of Representatives was meant to be free of the malapportionment then existing in some of the state legislatures" and that Congress' supervisory power under Article I, S 4, was intended "to vindicate the people's right to equality of representation." Wesberry, 376 U.S. at 16. Equal representation provides to the people a vote of equal weight wherever the people are located. Thus, the Court said, "[e]lections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state." Id. at 17 (quoting a lecture of Justice James Wilson, who participated actively in the Constitutional Convention). The

principle has been summarized as follows: "The basic constitutional principle of equal representation established by Art. I S 2 forbids and eliminates, so far as congressional representation is concerned, the consideration of any factor other than population." Preisler v. Secretary of State of Missouri, 257 F.Supp. 953, 973 (W.D.Mo. 1966) (decision of three judge court), Aff'd Kirkpatrick v. Preisler, 385 U.S. 450 (1967); cf. Davis v. Bandemer, 478 U.S. 109 (1986) (holding that the Fourteenth Amendment guarantees that a State, in dividing itself into geographical voting districts, may not identify voters of one political party with the intent and effect of diluting the vote of another party).

It cannot legitimately be disputed, therefore, that under the structure of the Constitution, the House

of Representatives is established to provide direct and equal representation of the people without any interfering agency on the part of the states. The states' role is limited to establishing the time, place and manner of elections (subject to federal supervision) and to providing the people with districts that assure direct and equal representation. The criteria to be applied by the states in discharging this responsibility can be based only on policies which secure the direct and equal representation of the people--not of legislators, interest groups, or perceived interests of the state as a whole--in order to assure representation without vote dilution for a particular interest. Accordingly, it must be conceded that the right of the people to elect directly their Representatives to the larger House of the federal legislature means nothing if

the Constitution does not forbid the states from manipulating the boundaries of congressional districts in attempts to influence the outcome of the people's congressional elections.

This said, one must ask what constitutionally permissible means are available to the states in carrying out their duty to designate representative districts which effectuate the right of their citizens to elect a delegation to the House. The starting point must be the proposition that the state legislatures, and consequently the district lines that they draw, should aim at minimizing the states' effect on the outcome of the election. The division must not focus on a particular classification of citizens in a way that "unnecessarily abridges" their vote. See Wesberry, 376 U.S. at 17-18 ("Our Constitution leaves no room for

classification of people in a way that unnecessarily abridges this right."). It is thus observed that in dividing its citizens into geographical districts, a state may not identify voters as rich, poor, democratic, republican, persons who voted for one candidate, or persons who are expected to vote for another. For to do so would constitute "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes"-- the classic definition of a gerrymander. See Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). Not only do such classifications interpose an improper interference by the state, an agency that was clearly intended to be excluded in the determination of House members, but more insidiously, the recognition and enhancement of one class

of people or voters necessarily dilutes the representation and vote of other classes not favored.

When we eliminate from consideration any classification of the people or of the voters for the purpose of favoring one class and diluting another, we are left with criteria for creating districts in a manner that is "neutral." Cf. Karcher, 462 U.S. at 759 ("[That] neutral decisionmakers developed the plan on the basis of neutral criteria" along with other facts, results in attachment of "a strong presumption of validity [to the redistricting plan].") (Stevens, J., concurring). While the possibilities are numerous, for whatever practical reasons may exist, the historical choice has been geological structures and long-standing boundaries, including state municipal and county subdivision

boundaries. It must be recognized from the start that even these criteria are not absolutely neutral. See Davis v. Bandemer, 478 U.S. at 129 (arguing that improper political intent in state redistricting should be easily proved because "[t]he reality is that districting inevitably has and is intended to have substantial political consequences" (quoting Gaffney, 412 U.S. at 753)). But to conclude that the nonexistence of totally neutral districting criteria means that no limits may be placed on any attempt by the States to alter the outcome of the election of the people's representatives in Congress is tantamount to concluding that the Article I debates at the Constitutional Convention had no meaning.

Concepts of compactness and contiguity and restrictions to

established geographical features have served, since the earliest decisions to divide the states into congressional districts, as constraints on the political will of state legislatures against the usurpation of the people's vote. See, e.g., Act of June 5, 1842, S 2, 5 Stat. 491 (1842); Karcher, 462 U.S. at 756 ("To some extent, geographical compactness serves independent values; it facilitates political organization, electoral campaigning, and constituent representation.") (Stevens, J., concurring); id. at 776 (arguing that departure from existing geographical and political boundaries leads to unlimited potential for deliberate partisan gerrymandering) (White, J., dissenting). While other constraints may prove to be "more neutral," these restrictions may at least be said to establish a "floor of neutrality" below which the states

cannot venture.

As a first principle in establishing district boundaries, then, a state legislature may make no classification of voters or of the people (except possibly to comply with the Fifteenth and the Voting Rights Act as hereafter noted), but instead must rely on available neutral criteria. Just as the numerosity requirement established by Kirkpatrick and Karcher is strictly enforced to prevent vote dilution caused by variances in population, so too must the prohibition against voter classifications.

The Fifteenth Amendment requires application of a second principle allowing limited consideration of race. The Great Compromise classified slaves for the purpose of measuring the relative representation of the States. See U.S. Const., art. I, S 2, cl. 3.

Even during the debates this was problematic and shortly thereafter Madison awkwardly sought to defend it. See The Federalist No. 54 (James Madison). The American Civil War, the adoption of the post-war Amendments, including particularly the Fifteenth Amendment, and the enactment of the Voting Rights Act of 1965, 42 U.S.C. S 1973 (1988), have attempted to correct that error. Today it is the law of the land that, before drawing any lines, we ensure that "the right of any citizen of the United States to vote [is neither abridged nor denied] on account of race or color." 42 U.S.C. S 1973 (1988); see Thornburg v. Gingles, 478 U.S. 30 (1986). This second principle, along with the strict equality of district populations also required by Article I, S 2, is a necessary overlay to any redistricting plan. Naturally, the

strict one-person, one-vote requirement can only be applied after the districting process is begun using neutral criteria. Otherwise, the required precision of the apportionment limitation would lead to an apparent justification for affecting the outcome of the people's election. See Wells v. Rockefeller, 394 U.S. 542, 551 (1969) (contending that a standard "of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort") (Harlan, J., dissenting).

Finally, any state legislative enactment that draws congressional district lines is subject, in theory, to the Equal Protection Clause of the Fourteenth Amendment. As a practical matter, however, the issue need not be reached in congressional redistricting cases because compliance by the state with the requirement of Article I to

provide direct and equal representation of the people in drawing district lines necessarily provides the people equal protection of the laws. Moreover, the standard for satisfying Article I is a stricter one then that for satisfying the Fourteenth Amendment. See Karcher, 462 U.S. at 732-33.

In summary, to comply with the Constitution and other federal law, a congressional redistricting plan undertaken by a state legislature must begin with neutral criteria, such as natural barriers or city and county lines, and then be modified to the extent necessary to achieve numerical equality of population within the districts. Finally, the state must check to ensure that the resulting districts comply with the Fifteenth Amendment and the applicable mandates of the Voting Rights Act.

II

Given the conclusion that Article I requires more than simple numerical equivalence of congressional districts, I would go beyond the fact finding efforts of the majority to consider whether the State used other than neutral criteria in devising its plan to divide Maryland into eight congressional districts. In doing so, it is appropriate to look first at the map which is the final product of the State's decisionmaking process. If the plan forms compact and contiguous districts which largely follow county, municipal, or identifiable geographic boundaries, then the court can presume, absent direct evidence to the contrary, that the districting plan is neutral. On the other hand, where the final plan includes shapes that look more like characters on a Saturday morning

television program than compact voting districts, the court should look behind the plan to question how the legislature arrived at its final decision.

A look at a map depicting the redistricting plan suggests that the State did apply neutral criteria in preserving intact the southern, eastern and western regions of Maryland. The district lines in these three regions follow county boundaries and geographic lines. In the center of the state, however, the convoluted shapes of the state's remaining five congressional districts call into question the neutrality of the plan. District 4, which lies predominately in Prince George's County, wanders across the county line into Montgomery County, from which it plucks about 159,000 persons. District 3, which was referred to on the floor of the House of Delegates as the

"splitting amoeba," darts in and out of the City of Baltimore, as it weaves its way through three other counties as well. District 1, which encompasses all of Maryland's eastern shore, leaps across the Chesapeake Bay into Anne Arundel County, rather than follow the contour of the bay and the state's northern border into Harford County. And District 2 finds its way from Baltimore County across the Patapsco River into Anne Arundel County to pick up 45,000 residents of Dundalk and vicinity.

The evidence in this case substantiates the suspicion that these districts were drawn to serve political interests, a fact conceded by the State at oral argument. In the northern portion the overriding concern of the state legislature was to accommodate the desires of U.S. Representative Bentley.

She both publicly and privately objected to the initial plan of the Governor's Advisory Committee and threatened to challenge it in court because the plan would have eliminated Bentley's 1990 district and paired her against U.S. Representative Gilchrist in District 1 on Maryland's eastern shore. In addition, Representative Bentley informed state Senator Pica, head of the Maryland Senate redistricting committee, of her desire for "a district she believed she could win [in] the next election." Ultimately she got what she wanted.

State Senator Miller, who served on both the Governor's Advisory Committee and the final conference committee, through that "it was particularly unfair to Congresswoman Helen Bentley to ask her to consider running on the Eastern Shore, especially

when her forte was the port of Baltimore, which is in the Dundalk, Essex region." In the final redistricting plan, Bentley's District 2 jumps the Patapsco River into Anne Arundel County to secure for her the port area. In addition, rather than extend District 1 from the eastern shore into Representative Bentley's district, the legislators attached a portion of Anne Arundel County to the eastern shore by way of the Chesapeake Bay Bridge.

There are no apparent geographic explanations for the unique configuration presented by District 3. Interestingly, according to Bentley's legislative director, U.S. Representative Cardin wanted portions of Baltimore City, Baltimore County, and Howard County, three of the four counties through which District 3 now snakes. Furthermore, the uneven

boundary between this district and that of Representative Bentley was apparently carefully drawn to allocate between the two districts particular politicians, including two state senators, a state delegate and a United States attorney.

A third cause of the curious division of the State's center was the clear desire to construct a district for Representative Hoyer, the fourth ranked Democratic member of the United States Congress. Senator Pica reported that there was a "prevailing feeling" in the General Assembly that the plan should assure Hoyer a "safe seat." This report was confirmed by a congressional aid who heard several state senators on the floor of the senate chamber discussing efforts to do so. The efforts were also much the subject of the press at the time. Hoyer expressed an interest in representing Prince George's County,

where he resides, as well as southern Maryland, where he maintains a vacation home.

The need to draw Representative Hoyer a "new" district arose from the perceived need to create a black-majority district in Prince George's County along the northeastern border of the District of Columbia. Hoyer's old district in Prince George's County would well have suited this requirement, but the legislators wanted to "guarantee" the election of a minority candidate and feared that Hoyer would lose if forced to run in a minority district. As the State explained,

> [An alternative plan], while creating a minority district, puts a white incumbent in the district. While this may have survived a legal challenge, this plan increases the probability that the State could

lose one of its most senior and powerful congressmen. The legislature was at liberty to decide that the possibility of losing Congressman Hoyer was detrimental to the entire state. This plan would also have made it more difficult for a minority to be elected from that district.

Overriding desires expressed at the public meeting in Hyattsville, the legislators thus carved the county into two districts. The minority district, District 4, winds through Prince George's County (conveniently avoiding the residence of Mr. Hoyer) and into southeastern Montgomery County. Consonant with Hoyer's wishes, District 5 includes the remainder of Prince George's County and all of Southern Maryland.

Ironically, when questioned

whether a "new white-majority district" should be created for Hoyer, seventy per cent of the Prince George's County voters polled responded "No." Statewide, sixty-five per cent also responded "no." When made aware of these results, however, Senator Pica replied, "[K]nowing Congressman Hoyer's position in the House of Representatives, I would still try to reserve that status in Congress."

Creating a minority district in which Hoyer would not run prompted the legislators to allocate the remaining seven districts among the eight incumbent representatives. The final placement of the district boundaries in the center of the State was determined by the decision to eliminate Representative McMillan's former district and pit him, not against Bentley, Hoyer or Cardin, but against

the junior Republican Representative, Wayne Gilchrist, of District 1. Indeed, the precinct in which McMillan resides is the only one in the Crofton area which was included in that portion of Anne Arundel County that was swept across the bay into District 1.

In light of this evidence I find that the State did not use neutral criteria to establish its eight congressional districts. Instead, the driving force behind the placement of the new district boundaries was a desire to promote the election bids of certain incumbent representatives at the expense of other, less senior incumbents. The Constitution gives to the voters of Maryland a right to make their own choices about reelecting their present Congressmen to represent them against in Congress. The State's attempts to defeat that right by manipulating

district line, either by unnecessarily pitting incumbents against one another or by enhancing the prospects of one candidate over another, cannot be reconciled with Article I, S 2, and Wesberry.

I therefore conclude that Maryland's 1991 congressional redistricting plan as contained in H.B. 10 violates the mandate of Article 1, S 2, that such plans provide direct and equal representation to the people, and, accordingly, I would not permit an election to proceed on the basis of H.B. 10.

For the foregoing reasons, I respectfully dissent.

Map of Central Maryland Showing
Congressional Districts Adopted in H.B. 10
(October 22, 1991)

APPENDIX B

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, et al.	)	
Plaintiffs	)	CIVIL ACTION NO.
vs.	)	S91-3200
THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, et al.	)	
Defendants	)	

* * * * * *

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Anne Arundel County Republican Central Committee, et al., Plaintiffs above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the three-judge district court, entered in this action

This appeal is taken pursuant to 28 U.S.C. Section 1253.

/S/ John R. Greiber, Jr.
JOHN R. GREIBER, JR.
Attorney for Plaintiffs
166 West Street
P.O. Box 1747
Annapolis, MD 21404

(401)268-1121

(No. 07134)

I HEREBY CERTIFY that on this _____ day of _____, 1992, a copy of the aforegoing was hand-delivered to Evelyn O. Cannon, Esq., Assistant Attorney General, 20th Floor, 200 St. Paul Place, Baltimore, MD 21202 and to James C. Praley, The State Administrative Board of Election Laws, P.O. Box 231, Annapolis, Maryland 21404.

/S/ John R. Greiber, Jr.
JOHN R. GREIBER, JR.
(No. 07134)

APPENDIX C

AFFIDAVIT
OF
DELEGATE
JOHN G. GARY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, et al.	)	
Plaintiffs	)	CIVIL ACTION NO. S91-3200
vs.	)	
THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, et al.	)	
Defendants	)	

* * * * * *

AFFIDAVIT

I, Delegate John G. Gary, hereby declare that:

1. That I am over eighteen years of age and competent to testify.

2. That I am a resident of Anne Arundel County, Maryland.

3. That I am a Delegate of the Maryland General Assembly.

4. On October 22, 1991, the House of Delegates was convened at approximately 2:00 P.M.

Speaker Mitchell placed H.B. 10, which had been amended in the Senate, on the floor for debate.

Delegate Nancy Koop, who was the Chairman of the Conference Committee, attempted to explain the bill.

Delegate Busch requested a 30-minute recess so that we could review the new plan in detail.

Speaker Mitchell denied the motion.

Delegate Busch directed question to Delegate Kopp regarding which precincts were in which districts.

Delegate Kopp referred to the actual bill (H.B.10), but was unable to answer the question by Delegate Busch.

Speaker Mitchell realized that

Delegate Kopp could not answer the question, thus he recessed the House for 30 minutes.

The Anne Arundel County Delegation met with Karl Aro (Chief Advisor for Legislative redistricting in Legislative Services) and Susanne Brogan (Legislative Aide to the Speaker), there were several reporters present which listened to our conversation, in the Press Room behind the Chambers.

I asked Ms. Brogan why Gibson Island, Pasadena, and Lake Shore were removed from District 1 and placed in District 2, and why parts of Baltimore City (Curtis Bay) was placed in District 1.

Ms. Brogan's reply, quoting as closely as possible, "You are not going to like my answer, but it simply was done to give Tom McMillan more Democrats in his new District ... We took some Republicans out of District 1 and put

them in Helen Bentley's District, so that District 1 would have more Democrats ..."

I asked her - "You mean it was done simply to give Tom more Democrats so that he would have a better chance against Gilcrest?"

Ms. Brogan replied - "That's right, it was purely political ... after all we were cutting up his District (McMillan's)... We had to do something to satisfy him.

I asked Karl Aro - "Is that true? Was this done simply to make the numbers work?"

He replied - "Yes, we had to get the numbers close numerically ... so we included Curtis Bay because it is heavily Democratic."

I said - "You're kidding me?"

He replied: "No... that's why it was done. Don't shoot me, I only work the

numbers ... that's what I was told to do."

I again questioned Ms. Brogan: "How are Gibson Island and Lake Shore connected to the Second District?"

She replied: "We don't consider the water as separating the District."

and Karl said: "That's right the water is not a consideration..."

I then said, "But these aren't even connected by a bridge ... you would have to go by boat or drive 30 minutes through two other congressional districts?"

and Karl replied: "That's right ... but it is allowable. We don't have to consider a body of water as a separation ... as long as the numbers are correct and they can be fairly represented."

I ended the conversation by saying, "I don't believe that!"

Later, on the floor of the House

(during debate) when I asked the same question of Delegate Kopp, concerning the separation of the district, she gave me the exact same answer as Karl Aro and Ms. Brogan.

I, hereby declare, under penalty of perjury that the foregoing is true and correct.

/S/ John G. Gary
JOHN G. GARY
Delegate

SUBSCRIBED AND SWORN to this ____ day of December, 1991, before me, a Notary Public in the State of Maryland.

My Commission Expires: _____

_____
Notary Pubic

(2)

No. 91-1514

FILED

APR 20 1992

OFFICE OF THE C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, *et al.*,

Appellants,

v.

THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, *et al.*,

Appellees.

Appeal From the United States District Court for the District of Maryland

---

MOTION TO DISMISS OR AFFIRM

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April 20, 1992

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Assuming arguendo that appellants showed that the State did not make a good faith effort to achieve population equality by showing the existence of a bill with a maximum deviation of one person less and an average deviation of .26 persons less than the 10 person and 2.75 person deviation in the bill adopted, are the variances justified by legitimate State policies including keeping major regions intact, creating a minority district and recognizing incumbent representation?

2. Whether Art. I, §2, of the Constitution absolutely precludes legislative consideration of political factors in the fashioning of a congressional redistricting plan?

3. Whether appellants may challenge Maryland's creation of a minority congressional district where no voting rights or racial discrimination claim was raised or decided below and where no party votes or resides in the minority district?

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No. 91-1514

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, et al.,

Appellants,

v.

THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, et al.,

Appellees.

Appeal From the United States District Court for the District of Maryland

MOTION TO DISMISS OR AFFIRM

Appellees, the State Administrative Board of Election Laws and Winfield M. Kelly, Jr., in his official capacity as Secretary of State (hereinafter referred to jointly as "the State" or "appellees"), for reasons detailed herein,

urge the Court to dismiss this appeal because it raises no substantial constitutional question. In the alternative, they move that the judgment of the three-judge district court below, reported at 781 F.Supp. 394 (D.Md. 1991) be summarily affirmed.

COUNTER-STATEMENT OF THE CASE

On October 22, 1991, the General Assembly of Maryland passed and, one day later, the Governor signed House Bill 10 ("H.B.10"), the State's congressional redistricting plan.[1] This plan was enacted with bipartisan support and, in terms of population equality, was the best redistricting plan ever adopted by

---

[1] The plan will be published as Chapter 4, Laws of 1991 (2nd Special Session). A corrective amendment to the plan, which conforms a geographic description to plan maps, see Jur. State. App. at 6a, n.1, was enacted as part of Chapter 22, Laws of 1992. The plan will be codified in Art. 33 of the Maryland Code, §§22-2 - 22-10.

the State of Maryland. It has an average variance among eight congressional districts of .00046% or 2.75 people and a maximum deviation between population in the highest and lowest districts of .0017% or 10 people.[2]

Development of the Plan

Passage of H.B.10 marked the end of a long process that began in May, 1991, when the Governor appointed a five-member, bipartisan Redistricting Advisory Committee to study and develop redistricting plans for the State. The Committee held 15 public hearings across the State and received numerous recommended plans. Those hearings showed that there was a public consensus for

---

[2] These variances were much lower than the census undercount for Maryland. According to the U.S. Census Bureau's June 1991 Post-Enumeration Survey, the State of Maryland has an undercount of 1.8% or 87,532 people.

two things: keeping the three major regions in the State (Western Maryland, Southern Maryland and the Eastern Shore) intact and a minority district in the Washington suburbs.

In August, 1991, the Committee recommended a plan that met these requirements, but which stirred controversy by dividing Baltimore County among five districts and pairing two Republican incumbents (Representatives Bentley and Gilchrest) in the First District.[3] Following a public hearing on September 3, 1991, the Committee proposed a new, less partisan plan. Both of these proposals were embodied in legislation introduced at a special session of the

---

[3] Because the plan preserved the State's outer regions and because the minority district was fashioned without an incumbent, it was inevitable that two incumbents would be paired and that one or more counties in the middle of the State would be divided.

Maryland General Assembly that began September 25, 1991. Additional bills were introduced and a number of them were offered as floor amendments.

After weeks of wrangling and conference committee deliberations, H.B.10 emerged as a compromise vehicle. This measure did not pair incumbents of the same party or disadvantage senior Republican or Democrat incumbents. Rather, it pitted the two junior members of the Democratic and Republican parties in the First District. Unlike any measure that previously went to a vote, H.B.10 had solid bipartisan support and its single digit variances improved upon and were the smallest of any bill or amendment voted on by either house. Only House Bill 22 ("H.B.22")[4], which

---

[4] This was the Bill relied upon by appellants to show that the State had not complied with the continued

was never offered as a floor amendment, and which was introduced late in the Session after H.B.10 had already gone to conference, had lower variances: a maximum deviation of 9 persons -- one less than H.B.10 -- and an average deviation of 2.49 persons compared to H.B. 10's 2.75. Even the Republican sponsor of H.B.22 voted for H.B.10. The redistricting plan embodied in H.B.10 preserved the State's outer regions and established a minority district, the Fourth Congressional District, in Montgomery and Prince George's Counties without the incumbent Representative Hoyer.

Proceedings Below

On November 12, 1991, appellants, five Anne Arundel County voters and two

---

one-person/ one-vote requirements of Art. I, §2. Complaint ¶68, App. at 33a-34a.

political organizations -- the County Republican and Democratic Central Committees, filed suit in the U.S. District Court for Maryland challenging the constitutionality of the congressional redistricting plan. Specifically, the complaint alleged that the plan violated the principles of one person one vote and [was] . . . the product of invidious partisan gerrymandering." Complaint at ¶1. App. at 3a. The heart of appellants' complaint was that Anne Arundel County had been divided among four districts. Jur. State. App. at 8a.[5] The

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[5] At oral argument, the following colloquy occurred between Judge Niemeyer and appellants' counsel:

> Judge Niemeyer: Well, let me ask you this about that, which sounds to me is the crux of your case, is that Anne Arundel County you identify as a community of interest --
>
> Mr. Greiber: Yes, your honor.

continued

appellants alleged no racial discrimination claim under Section 2 of the Voting Rights Act, 42 U.S.C., §1973, or the Fifteenth Amendment to the Constitution; and did not attempt to state a claim of racial discrimination under the Fourteenth Amendment. And appellants pressed no claim on behalf of any candidate or his or her supporters.

The State filed a motion to dismiss and/or summary judgment arguing that the appellants could not demonstrate that the redistricting plan was not the result of a good faith effort to reach precise mathematical equality because within the basic framework of H.B.10,

---

Judge Niemeyer: And you argue that that community of interest is diluted by having you become a minority in four other communities of interest.

Mr. Greiber: Yes, your honor.

Transcript at 34.

there was no obvious reduction the Legislature could have made to avoid or significantly reduce variances. In addition, the State contended that the minute variances of H.B.10 were justified by the State's interests in keeping intact the three major regions that surround the State's center, creating a viable minority voting rights district, promoting bipartisan political fairness, splitting as few counties as possible, and avoiding the administrative difficulties caused by splitting election precincts near county boundaries. With respect to the appellants' partisan gerrymandering contention, the State argued that the redistricting plan approved by a bipartisan majority could not be shown to have the effect of shutting any groups out of the political process and that the appellants had

failed to specify any identifiable political group harmed by the plan.

Decision Below

Following a hearing before a three-judge panel, the court by a 2-1 vote upheld the constitutionality of the plan. The majority held that the existence of another plan with a variation of one person less than H.B.10, see p.5, supra, shifted the burden to the State to justify the deviation.[6] Jur. State. App. at 11a. However, the majority concluded that the State had "set forth several convincing, consistent, and legitimate justifications for the numerical deviations within H.B.10." Jur. State. App. at 16a-17a.

---

[6] The dissenting judge concluded that there was no significant variance between districts requiring justification by the State. Juris. State. App. at 39a.

> These include: (1) keeping intact the three major regions that surround the center of the state (specifically, the Eastern Shore, Southern, and Western Maryland), (2) creating a minority voting district, and (3) recognizing incumbent representation with its attendant seniority, in the House of Representatives. . . .

Id.

Turning to appellants' second claim, the majority concluded that they had failed to show "[t]he type of partisan discrimination treated in Davis [v. Bandemer]." Jur. State. App. at 27a.[7] In addition, the majority concluded that there was no showing of discriminatory vote dilution. Id. at 35a-36a. The court also rejected the appellants' First Amendment claim, id. at 36a -- an issue not pressed in this Court. The dissenting judge contended that Article

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[7] In fact, both the majority and the dissent point out that the plan was drawn to increase the probability of the reelection of incumbents from both parties. Jur. State. App. at 23a, 74a-76a.

I, §2, unlike the Fourteenth Amendment, requires that the states use "neutral criteria" in drawing congressional district lines. Id. at 69a-70a. On January 21, 1992, appellants noted an appeal to this Court.

REASONS FOR DISMISSAL OR SUMMARY AFFIRMANCE

Except for their assertion that a congressional redistricting claim must be drawn using only "neutral criteria", appellants have not challenged the holding of the district court on one-person/one-vote or on partisan gerrymandering, but instead raise several new claims. None of these new claims are properly before the Court and appellants' claim that a legislature may not consider politics when redistricting does not raise a substantial federal question.

Therefore, the appeal should be dismissed or alternatively the decision should be summarily affirmed.

I. There Is No Substantial Federal Question In This Case Concerning The Adequacy Of The State's Justifications For The Minute Variances In H.B.10.

No substantial federal question is raised concerning the sufficiency of the State's justifications because the appellants failed to meet their burden of proof below to show a lack of a good faith effort to achieve absolute population equality. Specifically, appellants failed to show that the average variance of 2.75 was significant, that any alternative plan had a significantly lower variance or that a lower variance could have been achieved by minor adjustments to the State's plan. To the contrary, the evidence below showed that the General Assembly made a concerted

effort to achieve absolute population equality, with each plan considered coming closer to that goal, and that the variance in the Plan as it passed approached equality "as nearly as is practicable." Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964). The appeal should be summarily dismissed for this reason alone.

Assuming arguendo that appellants showed a lack of good faith effort to achieve absolute equality, the district court properly found that the miniscule variances in the Plan were supported by several "convincing, consistent, and legitimate justifications" Jur. State. App. at 16a. One of these justifications, creating districts based on the Eastern Shore, Western Maryland, and Southern Maryland, has not been questioned by appellants at any stage of

this litigation and is in itself sufficient to justify the minor variances in the Plan. Thus, alternatively, the decision of the district court should be summarily affirmed.

II. A Congressional Redistricting Plan Is Not Somehow Tainted And Thereby Rendered Unconstitutional Simply Because Politics Played A Role In The Development Of The Plan.

A. There is no requirement in Art. I, §2, that a congressional redistricting plan use only neutral criteria.

Appellants' major premise, derived from the dissenting judge's opinion, that Article I, §2, requires a state to use only "neutral" criteria in developing a congressional redistricting plan, has been repeatedly rejected by this Court during the last two decades. See, e.g., White v. Weiser, 412 U.S. 783, 796 (1973) ("Districting inevitably has sharp political impact and inevitably political decisions must be made by

those charged with the task."). In fact, this Court has specifically rejected any suggestion, that redistricting must be done using a "politcally mindless approach." Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

In Gaffney, this Court recognized that a legislature will have and use the type of political information about voters that the appellants and the dissenting opinion below allege make H.B.10 unconstitutional.

> The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward.
>
> * * *
>
> [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious but absolutely unavoidable that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly

> Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator.

412 U.S. at 753 (emphasis added).

This Court has consistently made clear that those charged with the task of congressional redistricting are state political bodies, and that a federal court should, wherever possible, defer to a state legislative judgment on districting. See, e.g., White v. Weiser, 412 U.S. at 794-95 and cases cited therein. Requiring that congressional districts be drawn using only neutral criteria, "virtually guarantees that a federal court, in a sort of judicial receivership, will ultimately conduct redistricting," Jur. State. App. at 25a. To avoid having federal courts usurp a legislative body's redistricting plan, the political considerations embodied in

that plan should not to be set aside by the federal judiciary absent solid constitutional or statutory grounds for doing so. White v. Weiser, 412 at 796.

Appellants and the dissent below rely upon one sentence in Wesberry v. Sanders, 376 U.S. 1, 17-18 (1963), to argue that notwithstanding Gaffney and Davis v. Bandemer, 478 U.S. 109 (1986), a state legislature may not use political considerations when it is undertaking congressional redistricting. Jur. State. App. at 63a. However, as the majority below points out, political considerations are as legitimately a part of congressional redistricting as they are a part of legislative redistricting.

> The idea that Art. I, §2, prohibits taking any 'political' factors into account is flatly contradicted by the language in Karcher [v. Daggett, 462 U.S. 725 (1983)].

> "We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time." 462 U.S. at 739.

(Jur. State. App. at 20a). In fact, the Karcher court clearly stated that political considerations, such as "avoiding contests between incumbent Representatives" are "legitimate objectives." Id. at 740.

It is preposterous to suggest that "political considerations which [this Court has held] constitute appropriate justifications under Karcher's second prong somehow violate Art. I, §2, or other federal constitutional mandates, or both." Jur. State. App. at 34a. This Court "would hardly have put its stamp of approval on a justification under Karcher's second prong, if such

justification were constitutionally invalid for any other reason." Id. at 34a-35a. See also Upham v. Seamon, 456 U.S. 37, 39-41 (1982) (District Court erred in not deferring to legislative judgment to formulate the creation of a "safe" minority district.) As the lower court in Badham v. Eu, 488 U.S. 1024 (1989) (mem.), affirming 694 F.Supp. 664 (N.D.Calif. 1988), recognized, this Court's decisions in Kirkpatrick v. Preisler, 394 U.S. 526, 534, reh. denied, 395 U.S. 917 (1969), and Karcher, 462 U.S. at 734 n.6 are "inconsistent with the notion that partisan gerrymandering is itself an Article I, §2 violation." Badham, 694 F.Supp. at 674. Here the evidence showed that political considerations led to a plan designed to provide a "safe" seat to both Democratic and Republican

incumbents.[8] The only incumbents pitted against each other were junior congressmen from each party. Appellants' bipartisan challenge to this bipartisan plan does not present a substantial federal question.[9]

B. Appellants are not a cognizable group and did not show dilution of their vote by an unconstitutional partisan gerrymander.

As the majority below recognized the "heart of the plaintiffs' argument

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[8] Although the Court found that the State had drawn the district lines in part in order to provide Congressman Hoyer, "the fourth ranked Democratic member of the United States Congress" a "safe" seat, there was testimony from the Speaker of the House and the President of the Senate that his district was far from safe, Transcript at 82, and providing Hoyer a safe seat was not one of the justifications put forward by the State, State's Memorandum at 24.

[9] H.B. 10 was truly a bipartisan bill. In the Senate, the vote was 36-10, with 8 of 9 Republicans and 28 of 37 Democrats voting for it. In the House, the vote was 110-22, with 22 of 24 Republicans and 88 of 108 Democrats voting for it.

is that Anne Arundel County . . . has been divided by H.B. 10 among four separate . . . congressional districts, thus 'diluting' the votes of the residents." Jur. State. App. at 8a. "In essence, . . . the plaintiffs contend that they, as Anne Arundel County voters, have some form of constitutionally significant community interest which will be diluted if H.B. 10 goes into effect." Jur. State. App. at 28a. However, the "nebulous and unworkable" concept of "communit[y] of interest", In re Legislative Districting, 299 Md. 658, 692 (1984), has no constitutional protection. Kirkpatrick v. Preisler, 394 U.S. at 533. Thus, whether to recognize a community of interest such as a political subdivision is a decision to be made by a state legislature. See Karcher v. Daggett, 462 U.S. at 733 n.5;

Alton v. Tawes, 384 U.S. 315 (1966), affirming Maryland Citizens for Fair Congressional Redistricting v. Tawes, 253 F.Supp. 731 (D.Md.) (Upholding court-ordered plan that split Anne Arundel County among three congressional districts).

Even if this Court were prepared to consider overruling its long line of cases holding that political considerations are legitimately taken into account by a legislature undertaking congressional redistricting, this appeal should nonetheless be dismissed because appellants are not a cognizable group, and assuming arguendo that they are such a group, they have failed to identify any harm they have suffered. The record is devoid of any evidence that plaintiffs' votes have been diluted. "Nothing the plaintiffs have presented

to this Court indicates that their vote will necessarily be any less powerful in any of the four congressional districts in which they will now reside [than it was when they all resided in one district]."[10] Jur. State. App. at 35a.

Under no circumstances will allegations that political considerations played a role in developing a plan, without any allegations that the effect is to discriminate against a cognizable group, require a federal court to find the plan unconstitutional. Davis v. Bandemer, 478 U.S. 109, 127 (1986); Badham v. Eu, 694 F.Supp. 664, aff'd, 488 U.S. 1024. See also Weiser, 412 U.S.

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[10] The dissent argues at length that Art. I, §2, does not permit districting that favors one class of voters over another class, Jur. State. App. at 41a, 44a, 46a, 58a, 64a); however, nowhere does the dissent identify the class of voters to which plaintiffs belong or identify how their vote is diluted.

at 797; Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966) ("The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.").

Even in the area of race discrimination, intent is not enough, there must also be evidence of discriminatory effect. See, e.g., Palmer v. Thompson, 403 U.S. 217, 224-25 (1971). Cf. United States v. O'Brien, 391 U.S. 367, 384-85 (1968) (Legislation is not unconstitutional solely because it was enacted with an improper purpose.) Burns v. Richardson, 384 U.S. at 88 (Multi-member districts will constitute invidious discrimination only if it "would operate to minimize or cancel out the voting strength of racial or political elements

of the voting population.", quoting Forston v. Dorsey, 379 U.S. 433, 439 (1965)).

Finally, to hold that Art. I, §2, requires a state to use "neutral" criteria when districting, would overrule the cases that hold that compactness, contiguity, community of interests, and boundaries of political subdivisions are not constitutionally required in congressional districting. See, e.g., Wood v. Broom, 287 U.S. 1 (1932); Kirkpatrick v. Preisler, 394 U.S. at 536 ("Modern developments and improvements in transportation and communications make rather hollow, in the [early 1990's concerns about] . . . geographical considerations."); Karcher v. Daggett, 462 U.S. at 734 n.6 (suggesting that guidelines as to compactness, contiguity, boundaries of political subdivisions, and

communities of interest are best left to states.)

The majority below correctly rejected plaintiffs' claim that Art. I, §2, absolutely precludes consideration of political factors in the development of a congressional redistricting plan. The Maryland plan treats both Democratic and Republican incumbents fairly and excludes no group from the political process. This Court should dismiss this appeal as there is no substantial federal question of unconstitutional partisan gerrymandering.

III. Appellants' Claim That A Minority District Was Improperly Created Is Not Before This Court.

Appellants argue that the State could not create a minority voting district because it did not first find that one was required by the Voting Rights Act. In appellants' view, intentional

creation of a district that is not majority white without making such a finding dilutes the votes of white voters. Appellants have not raised a substantial federal question by this claim because not only is this plainly not the law, the issue was not raised below, and appellants did not have standing to raise the issue in any event.

This issue should not be considered because it was not raised or decided below. Equal Employment Opportunity Commission v. Federal Labor Relations Authority, 476 U.S. 19, 23 (1986); Rogers v. Lodge, 458 U.S. 613, 628, n.10 (1982). The complaint in this case is completely devoid of any discussion of racial gerrymandering or dilution of the votes of white voters and does not even mention the race of any of the plain-

tiffs. Appellants' pleadings below mentioned the issue only tangentially in addressing the State's justifications, and the district court decided the issue only in that context, holding that creation of a minority district could "constitute an appropriate Karcher second-prong basis", Jur. State. App. at 23a-24a. Further, appellants filed an alternative plan with their complaint that included a minority district in the same geographical area. Transcript at 30.[11] The only difference was that

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[11] The State would have had to go out of its way to not have a minority district in the Washington suburbs. Prince George's County, which is the largest county in new minority Fourth District, has a majority black population according to U.S. Census figures. See Maryland Precinct Population Data for Redistricting, 1990 Census (May, 1991) at 19A. In addition, the minority district established had a black voting age population of only 55.8%. See 1991 Congressional District: Population and Housing Characteristics -- April, 1992 at 5 -- hardly a "super majority" as contended by appellants.

the white incumbent was in the district in appellants' plan. Thus, appellants' real argument is that the State could not protect an incumbent; however, as the majority below noted, the aim of giving "Congressman Hoyer, a congressman with high ranking and importance in the federal House of Representatives, a 'safe seat', Jur. State. App. at 22a, is "clearly within Karcher's ambit." Id. at 23a.

During their argument in rebuttal, in response to a question by Judge Smalkin, appellants asserted for the first time that creation of a minority district diluted the votes of whites who lived in the new minority district. Transcript at 115. Assuming arguendo that such a claim could have merit had it been properly raised below, appellants in this case cannot assert it

because all of them are residents of Anne Arundel County, Complaint, ¶¶7-13, App. at 6a-11a, no part of which is in the Fourth District, the new minority district. In order to establish standing, it is necessary to show that a party before the Court has suffered or will suffer some legal wrong. Air Courier Conference v. American Postal Workers Union, ___ U.S. ___, 111 S.Ct. 913 (1991). Thus, this Court has recognized that voters in a district that is adversely affected by an alleged unconstitutionality in a challenged redistricting plan have standing, Baker v. Carr, 369 U.S. 186, 206 (1962), but has not extended that holding to voters who are not affected or who benefit, Id. at 90, n.23; Tribe, American Constitutional Law §3-16, n.41 (2nd ed. 1988). Since appellants are not residents of the new

minority district, they lack standing to challenge the validity of the minority district.

Assuming arguendo the issue had been properly raised, and that appellants had standing, in order to make out a claim that creation of the minority district violated the rights of white persons under either the equal protection clause of the Fourteenth Amendment, appellants needed to show a discriminatory effect. White v. Regester, 412 U.S. 755, 766 (1973) (Plaintiffs claiming that a districting plan is discriminatory must prove "that the political processes leading to nomination and election were not equally open to participation by the group in question."); Thornburg v. Gingles, 478 U.S. 30 (1986)

(same required by Section 2 of the Voting Rights Act).[12] No evidence was presented below that would support a claim that any person's vote was diluted by the creation of the minority district. Specifically, appellants introduced no evidence of polarized voting.[13] Without such polarized voting, dilution of white votes could not be shown. Thornburg v. Gingles, 478 U.S. at 46 ("[T]he results test [of Section 2 of the Voting Rights Act] does not assume the existence of racial bloc voting; plaintiffs must prove it." (citation omitted)). Further, contrary to

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12 Appellants also need to prove racially discriminatory intent to state an equal protection claim, City of Mobile v. Bolden, 446 U.S. 55 (1980); however, no evidence of discriminatory intent was introduced.

13 In fact, appellants have argued, without supporting evidence, that voting in Prince George's County is not racially polarized. Jurisdictional Statement at 18.

appellants' assertions, United Jewish Organizations v. Carey, 430 U.S. 144 (1977), does permit race-conscious districting in the absence of discriminatory purpose or effect. Id. at 168 (Plurality Opinion of White, J., joined by Justices Stevens and Rehnquist) and id. at 179-80 (Stewart, J., concurring opinion in which Justice Powell concurred). See also Jordan v. Winter, 604 F.Supp. 807 (N.D.Miss.), aff'd, 469 U.S. 1002 (1984) (rejecting constitutional attack on §2 of Voting Rights Act); Garza v. County of Los Angeles, 918 F.2d 763, 776 (9th Cir. 1990), cert. denied, 111 S.Ct. 681 (1991) (same).

For all these reasons, appellants' claim that it was improper for the State to create a minority district should be dismissed.

IV. A Claim That The Plan Discriminated Among Incumbents Is Not Properly Before This Court.

Appellants also argue that the Fourteenth Amendment rights of certain of Maryland's Congressional representatives were violated because they were classified on the basis of seniority. No member of Maryland's Congressional delegation is a party to this case, and appellants do not have standing to assert their rights. Air Courier Conference v. American Postal Workers' Union, ____ U.S. at ____, 111 S.Ct. at 921. In addition, this issue was not raised in the Complaint in this case, nor in the pleadings below, and it was not decided by the district court and is, therefore, not properly before this Court. See DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 194, n.2 (1989); Youngberg v.

Romeo, 457 U.S. 307, 316 n.19 (1982); Dothard v. Rawlinson, 433 U.S. 321, 323 n.1 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970).[14]

CONCLUSION

For all of these reasons, the State contends that none of the issues actually raised and decided below merit plenary review by this Court or even implicit acknowledgement by affirmance, that they are substantial constitutional questions. A bipartisan congressional redistricting plan with microscopic and justifiable variances is not the kind of state law that requires intense scrutiny by a federal court. Rather, Maryland

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[14] Even if it had been properly raised it is not worthy of review. The lower courts have recognized that a representative has no constitutionally protected interest in representing any particular constituency. City of Philadelphia v. Klutznick, 503 F.Supp. 663, 672 (E.D.Pa. 1980); Shapiro v. State of Maryland, 336 F.Supp. 1205, 1210 (D.Md. 1972).

urges that the appropriate response to this appeal is to dismiss for want of a substantial federal question.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Complaint,
filed November 12, 1991.....1a-41a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE 3329 Oak Drive Edgewater, MD 21037	*	
and	*	CIVIL ACTION NO.
LAURA GREEN TREFFER 3329 Oak Drive Edgewater, MD 21037	*	VERIFIED COMPLAINT
and	*	AND REQUEST FOR A THREE
ANNE ARUNDEL COUNTY DEMOCRATIC CENTRAL COMMITTEE 438 Severnside Drive Severna Park, MD 21146	*	JUDGE PANEL
and	*	
KIMBERLY ANNE McCOY 438 Severnside Drive Severna Park, MD 21403	*	
and	*	
ROGER W. MOYER 419 5th Street Annapolis, MD 21403	*	
and	*	
ROBERT C. SCHAEFFER 799 Dividing Road Severna Park, MD 21146	*	
and	*	

E. LIBBY RAMSBOTTOM *
8060 Telegraph Road
Severn, MD 21144 *

Plaintiffs *

vs. *

THE STATE ADMINISTRATIVE *
BOARD OF ELECTION LAWS
P.O. Box 231 *
11 Bladen Street
Annapolis, MD 21404 *
James W. Johnson, Jr.,
Chairman *
Gene M. Raynor,
Administrator *

and *

WINFIELD M. KELLY, JR. *
in his official capacity
as Secretary of State *
State House
Annapolis, MD 21401 *

and *

BOARD OF SUPERVISORS OF *
ELECTION OF ANNE ARUNDEL
COUNTY *
11 Bladen Street
Annapolis, MD 21401 *

Defendants *

* * * * * * * *

COMPLAINT

Plaintiffs, by their attorney, John R. Greiber, Jr., Esq., hereby sue the above-named Defendants and say:

INTRODUCTION

1. Plaintiffs bring this action for declaratory relief seeking to have the enrolled House Bill 10 of the Maryland General Assembly (hereinafter "HB 10") which established the boundaries for the election of members of the United States House of Representatives from the State of Maryland be declared unconstitutional, and therefore, null and void. Without this Court's action, rights secured to the people of Maryland pursuant to Article I, Section 2 of the Constitution of the United States, and the First and Fourteenth Amendments of that Constitution, protectable under 42 U.S.C. Section 1983, will be violated as the congressional districts are no longer apportioned according to the principle of one person one vote and are the product of

arbitrary and invidious partisan gerrymandering. This Court's assistance is necessary in order to have a valid constitutional plan in place for an orderly election process in 1992.

2. This action also seeks injunctive relief prohibiting defendants from conducting congressional elections based on the districting plan contained in HB 10.

3. This action also seeks such other and further relief as the Court deems appropriate and necessary.

JURISDICTION

4. This Court's jurisdiction is founded upon:

a. 28 U.S.C. Section 2284(a) in that this is a challenge to the constitutionality of the apportionment of congressional districts in the State of Maryland. Furthermore, in accordance

with 28 U.S.C. Section 2284 (b)(2), notice of this action has been given to the Governor and the Attorney General of the State of Maryland by sending each, via certified mail, a copy of this Complaint; and

b. 28 U.S.C. Section 1331 in that this is an action which arises under the laws and Constitution of the United States, including the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to that Constitution, and the Declaratory Judgment Act, 28 U.S.C. Sections 2201 and 2202; and

c. 28 U.S.C. Section 1343(3) and (4), and 42 U.S.C. Section 1983 in that this is an action to redress the deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States and to secure equitable relief for protection of civil rights, including the right to vote.

VENUE

5. Venue is proper pursuant to 28 U.S.C. Section 1391(b) in that the claims which are the subject of this complaint arose in this District as did the acts and transactions constituting violations of plaintiffs' rights, and all parties reside in this District.

REQUEST FOR THREE-JUDGE PANEL

6. Pursuant to 28 U.S.C. Section 284(a), convocation of a three-judge district court is requested as this action challenges the constitutionality of the present apportionment of congressional districts in the State of Maryland.

THE PARTIES

7. Anne Arundel County Republican

Central Committee is an unincorporated political organization whose members engage in any and all activities necessary to ensure that their political ideas and statements fairly and effectively influence the political and election processes.

8. Laura Green Treffer is chairperson of the Anne Arundel County Republican Central Committee and is a resident of Anne Arundel County and a registered voter in the 1st Congressional District as identified in HB 10.

9. Anne Arundel County Democratic Central Committee is an unincorporated political organization whose members engage in any and all activities necessary to ensure that their political ideas and statements fairly and effectively influence and political and election processes.

10. Kimberly Ann McCoy is chairperson of the Anne Arundel County

Democratic Central Committee and is a resident of Anne Arundel County and a registered voter in the 1st Congressional District as identified in HB 10.

11. Plaintiff Roger W. Moyer is a resident of Anne Arundel County and a registered voter in the 1st Congressional District as identified in HB 10.

12. Plaintiff Robert C. Schaeffer is a resident of Anne Arundel County and a registered voter in the 2nd Congressional District as identified in HB 10.

13. Plaintiff E. Libby Ramsbottom is a resident of Anne Arundel County and a registered voter in the 5th Congressional District as identified in HB 10.

Defendants

13a. The defendant State Administrative Board of Election Laws was created by state statute. The membership of the board is appointed by the Governor. Among the responsibilities of the board is the duty to

maintain election records and other relevant election information and to supervise the conduct of elections throughout the state. In that capacity the board plays a role in the implementation, application and enforcement of the redistricting plan which is the subject of this litigation.

13b. The defendant James J. Johnson, Jr. is the Chairman of the State Administrative Board of Elections.

13c. The defendant Gene M. Raynor is the State Administrator of Election Laws.

13d. The defendant Winfield M. Kelly, Jr. is the Secretary of State for the State of Maryland. Among the responsibilities of the Secretary is the placing on the ballots for election the names of those individuals authorized and approved as candidates. As such, his office has a role in the administration of the elections for the U.S. House

of Representatives.

13e. The defendant Board of Supervisors of Elections of Laws of Anne Arundel County is under the auspice of the State Administrative Board of Election Laws and is responsible for maintaining election records and other relevant election information necessary to conduct state and congressional elections within Anne Arundel County. In that capacity the board plays a role in the implementation, application and enforcement of the redistricting plan which is the subject of this litigation.

THE FACTS

14. The United States Constitution, Article 1, Section 2, Clause 3 requires that the members of the House of Representatives be apportioned among the states based on population determined by a decennial census.

15. The decennial census conducted

in 1980 resulted in the allocation of eight (8) congressional seats to Maryland. Following the 1980 census, a redistricting plan was adopted. A copy of the congressional district map based on the 1980 census is attached hereto and incorporated by reference as Exhibit A.

16. Pursuant to 13 U.S.C. Section 141, a census was taken in 1990 for the purpose of determining the official population of the several states. The official population of Maryland was determined to be 4,781,468. The results of the census were reported to the Governor of Maryland for use in the apportionment of congressional districts as required by Section 141(c).

17. Pursuant to 2 U.S.C. Section 2a(b), the four hundred thirty-five seats in the United States House of Representatives were allocated among the fifty states on the basis of popula-

tion. Maryland was assigned eight (8) seats, the same number assigned as a result of the preceding census.

18. Assuming exactly equal population for each of the eight congressional seats, the ideal district following the 1990 census should contain 597,683 people.

19. In May, 1991, the Governor established a five-member Redistricting Advisory Committee (hereinafter "The Advisory Committee"). The Maryland Manual (1991-1992, p.486) described the purpose of the Advisory Committee as follows: "The Committee will make recommendations to the Governor and General Assembly on boundary changes for legislative and Congressional election districts. The changes are to reflect shifts in Maryland's population as recorded in the federal census of 1990."

20. The Advisory Committee consisted of the following members:

Chairman Benjamin L. Brown of Baltimore City, Norman Glascow of Montgomery County, Donna Feeling of Baltimore County, and, representing the Maryland General Assembly, R. Clayton Mitchell, Jr., Speaker of the House of Delegates (hereinafter "Speaker Mitchell") and Thomas V. "Mike" Miller, President of the Senate (hereinafter "Senator Mitchell").

21. The first order of business of the Advisory Committee was to adopt appropriate guidelines by which to review various redistricting proposals. The guidelines set forth the following general criteria to be considered during the redistricting process: equal representation, equal population, minority representation, contiguity, compactness, recognition of boundaries of political subdivisions, natural boundaries, precinct lines, communities of interest, and subdistricting. A copy of the

guidelines is attached hereto and incorporated by reference as Exhibit B.

22. By letter dated June 18, 1991, Speaker Mitchell urged members of the House of Delegates, specifically delegation leaders. to follow the guidelines adopted by the Advisory Committee. Furthermore, he stated that, in following the guidelines, the final plan would be strengthened by the "concerted effort to recognize and preserve the integrity of counties to the maximum extent possible, by being congnizant of communities of interest, and by retaining as much as possible the cores of existing districts." A copy of the letter from Speaker R. Clayton Mitchell, Jr., to Delegate John C. Astle is attached hereto and incorporated by reference as Exhibit C.

23. On or about August 22, 1991, the Advisory Committee unveiled its initial redistricting plan which kept

all of Anne Arundel County in the 4th Congressional District, with the exception of 14,000 residents in the southernmost precincts. Prior to the release of its plan, the Advisory Committee rejected numerous others, including a proposal by the majority of the State's congressional delegation, which would have split Anne Arundel County into as many as three districts.

24. On or about September 19, 1991, while Senator Miller was in Ireland, and just prior to the convening of the Special Session on Redistricting, Speaker Mitchell abandoned the Advisory Committee's first plan and stewarded a second plan, which received approval of the Advisory Committee by a 3-1 vote, Senator Miller being absent.

25. The action taken by Speaker Mitchell set the stage for a rancorous dispute between the respective leaders of the General Assembly.

26. A special session of the General Assembly for the purpose of considering and passing redistricting legislation was called by the Governor; the session was to convene on or about September 25, 1991.

27. The division between the leaders of the General Assembly resulted in the proceedings of the special session being described by one senator as "a zoo" (Sen. M.J. Wagner), and prompted another senator to sarcastically urge his colleagues to record their meetings so that "[their] stellar performance [could] be aired on public radio" (Sen. J.A. Cade).

28. Perhaps most prophetic, one delegate observed that the process would be "purely political" and that it was "an exercise in self-protection and political greed (Del. M. E. Busch).

29. Concerning the effect of the partisan political process on Anne

Arundel County, one senator (Sen. J.A. Cade) remarked that the county was "at a point where we're deciding whether to be shot, stabbed or hung..."

30. After contentious voting sessions, committees in the Senate and House of Delegates approved conflicting redistricting bills. The two bills crossed into the opposite houses of the legislature, where each was rejected.

31. On or about September 26, 1991, the deadlock over the redistricting issue caused Speaker Mitchell to abruptly recess the House until October 21, 1991. After the House recessed, the Senate amended the House plan to make it identical to the Senate version.

32. On or about October 3, 1991, the House of Delegates, pursuant to an opinion rendered by the Office of the Attorney General that its recess was violative of the State Constitution, reconvened and the General Assembly

resumed the debate over redistricting.

33. On or about October 10, 1991, the General Assembly moved to break the deadlock by appointment of a joint House-Senate Conference Committee (hereinafter "The Conference Committee") to resolve the redistricting issue.

34. The Conference Committee consisted of the following members: Senator Miller, Democrat, Prince George's County; Senator John A. Pica, Democrat, Baltimore City; Senate Majority Leader Clarence Blount, Democrat, Baltimore City; House Majority Whip Nancy Kopp, Democrat, Montgomery County, and Delegate John S. Arnick, Democrat, Baltimore County.

35. The Conference Committee did not include a minority party representative or any representative from Anne Arundel County.

36. On or about Friday, October 18, 1991, the Conference Committee

reached an impasse, and Speaker Mitchell threatened to adjourn the House sine die and let the redistricting issue be resolved by the federal courts.

37. During the ensuing weekend, another redistricting plan was drafted (HB 10) which divided Anne Arundel County among four congressional districts. Under the plan, 239,617 County residents were placed into the Eastern Shore' 1st Congressional District; 45,283 County residents were placed in the 2nd Congressional District (which cannot be reached from Anne Arundel County by land without travelling throughout at least two other Congressional Districts; however, it is directly accessible to yachtsmen); 64,081 County residents were placed in the 3rd Congressional District; and 78,528 County residents were placed in the 5th Congressional District. The plan ensured that the County residents

would not constitute a majority of the population in any of the four districts. A copy of HB 10 is attached hereto and incorporated by reference as Exhibit D.

38. Despite the fact that only members of the Conference Committee had knowledge of the content and effect of the plan, the General Assembly was scheduled to vote on the proposal on Monday, October 21, 1991 at 5:00 p.m.

39. In the absence of the customary written report, Senator Miller instructed Senator John Pica to give an oral report concerning HB 10.

40. After the approximate three minute oral report, members of the Anne Arundel County Senate delegation (hereinafter "the delegation") requested a recess prior to voting in order to obtain and consider the final printed copy of HB 10 which was not then available.

41. The Senate was recessed until

7:00 p.m. with the assurance from Senator Miller that final copies of the bill and supporting statistical data would be provided.

42. At approximately 5:45 p.m., incomplete and coded information sheets, without statistical data, were slid under the office doors of the members of the delegation.

43. After the Senate reconvened at approximately 7:00 p.m., a subsequent ten minute recess was granted at the request of the delegation, which had been told by Senator Miller that the plan was not subject to change.

44. In an effort to assess the impact of HB 10, the delegation began a filibuster.

45. The filibuster was ended at 11:45 p.m. when Senator Miller successfully moved to limit debate.

46. At 11:45 p.m., the Conference Committee Report was adopted by the

Senate and passed third and final reading by a vote of 36 to 10.

47. During the same time period, members of the House of Delegates, including the delegates from Anne Arundel County, received similar treatment. As in the Senate, no copies of HB 10 were available for review, and, because of the Senate filibuster, the House was recessed until October 22, 1991.

48. On October 22, 1991, the House of Delegates convened to vote on HB 10, and, after limited debate on the absence of any good faith effort underlying the bill, as evidenced by the splitting of precincts for as few as twenty or thirty residents, and the fragmenting of Anne Arundel County (especially the placement of a portion of the County in the 2nd Congressional District which is separated from the rest of the County by two other congressional districts and a

large body of water), the plan was adopted and passed on third and final reading by a vote of 110-22.

49. The enrolled HB 10 has a total population variance between the largest and smallest districts of 8,790 persons, and the average deviation between all districts is 1,098.75 persons.

50. Additionally, the House passed plan, inter alia, creates districts which are not contiguous or compact; divides counties into unnecessary fragments; fails to recognize communities of common social and economic interests; fails to recognize recent shifts in population; fails to preserve the core constituencies of preexisting districts; fails to recognize the right of political groups or associations to effectively influence and participate in the political process; and arbitrarily and invidiously debases and dilutes the votes of the residents of Anne Arundel

County by the unnecessary splitting of their County into four congressional districts.

51. The unnecessary splitting of Anne Arundel County has resulted in the conversion of the voters in the State's fourth most populous county into a minority voice in each of the four newly created congressional districts, thereby cancelling out or minimizing their voting strength.

52. Pursuant to state law, all candidates for the House of Representatives must declare their official candidacy for a specific congressional district on or before December 23, 1991.

53. Pursuant to state law, the congressional primary elections for party nominations is scheduled for March 3, 1992. The general election for the House of Representatives is scheduled for November 3, 1992.

54. By performing their respective

duties with regard to the challenged redistricting legislation, defendants, in their respective official capacities, have acted and will act under color of state law and official right.

55. The matter before the Court is appropriate of resolution because there is a substantial controversy between the parties having adverse legal interests of immediacy and reality.

CAUSE OF ACTION

Paragraphs 1 through 55 are hereby incorporated by reference as though fully set forth herein.

56. Article I, Section 2 of the Constitution of the United States provides in pertinent part:

> 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several states . . . .

In addition, Section 1 of the Fourteenth Amendment to the Constitution of the

United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These provisions of the Constitution guarantee to the citizens of the State of Maryland the right to vote in congressional elections, and require that the vote of each citizen be equally effective and be worth as much as any other vote cast in such elections.

57. The United States Supreme Court has held that Article I, Section 2 commands "that States create congressional districts which provide equal representation for equal numbers of people" and that "only the limited population variances which are unavoidable despite a good-faith effort to

achieve absolute equality, and for which justification is shown" are permitted. Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

58. The Supreme Court has also held that, although there are any number of consistently applied legislative policies which might justify some variance, the State must "show with some specificity that a particular objective required the specific deviation in its plan, rather than simply relying on general assertions." Karcher v. Daggett, 462 U.S. 725, 740-41 (1983).

59. The Supreme Court has long recognized that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system," Reynolds v. Sims, 377 U.S. 533, 562 (1964), and that "[c]ompetition in the marketplace of ideas is the center of the electoral process and of the first amendment freedoms. Williams v.

Rhodes, 393 U.S. 23, 32 (1968). Once these freedoms are implicated, the state must demonstrate a "compelling" interest if the restriction is to survive judicial scrutiny. NAACP v. Button, 371 U.S. 415, 438 (1963). The Supreme Court has further held that the ". . .the First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State." Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 121 (1981).

60. The Supreme Court has held "that claims of political gerrymandering (defined for the purposes of this complaint as the deliberate and arbitrary distortion of district boundaries for partisan purposes to provide advantages in future elections) lodged by members of one of the political parties that make up our two-party system are justi-

ciable under the Equal Protection Clause of the Fourteenth Amendment." Davis v. Bandemer, 478 U.S. 109, 126-127 (1986). Supportive of this holding, the Supreme Court has observed that "[i]ndiscriminate districting without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering Reynolds v. Sims, 377 U.S. 533, 578-79 (1964). To deter the possibilities of gerrymandering, the Court has recognized that "a State may legitimately desire to construct districts along political subdivision lines. . .". Id. at 581.

61. Although the Davis Court agreed that the claims of political gerrymandering had statewide effect, the plurality addressed the concerns of individual districts by stating that "[i]n a challenge to an individual district, this inquiry focuses on the

opportunity of members of the groups to participate in party deliberations in the slating and nomination of candidates, directly influence th election returns and to secure the attention of the winning candidate." Id at 132-133.

62. The Supreme Court and other federal courts have also recognized as a principle that any sort of gerrymandering, be it racial, religious, ethnic or political, is defensible, Cousins vs. City Council of the City of Chicago, 466 F.2d 830, 850, 852-53 (7th Cir. 1972), cert. denied, 409 U.S. 893 (1972), and that "a far greater potential threat to equality of representation [was] the gerrymander", as it is "profoundly destructive of the apportionment goal of 'fair and effective representation.'" Karcher, 462 U.S. at 776, 787 (White, J. and Powell, J. dissenting), and that "any distinction between racial and geographic discrimination is artificial

and unrealistic, Dyer v. Kazuhisa Abe, 138 F.Supp. 220, 236 (D. Hawaii 1956).

63. Finally, in discussing the legitimate criteria to be followed in drafting a constitutional districting plan, this Court has stated that "[a] basic goal [in drafting the Court's plan] has been to achieve the requirements of equality laid down in the Supreme Court decisions without doing unnecessary violence to the heart of existing districts, county lines, and district lines within the counties and ward lines in the city. We think that our plan makes the districts as compact as possible, and in the few cases where it was deemed necessary to split a county we have taken into account the character of the neighborhoods involved. In short, we have given dominant weight, as we think we must, to the population factor, without sacrificing other relevant considerations." Maryland Citizens

Committee for Fair Cong. Redist. v. Tawes, 253 F.Supp. 731, 734 (D.Md. 1966), aff'd sub nom Alton v. Tawes, 384 U.S. 315 (1966).

64. The individual plaintiffs, as citizens of the United States and as citizens of and registered and qualified voters of the State of Maryland, are entitled to vote for members of the United States House of Representatives and to cast votes that are equally effective as the votes of every other citizen of the State under Article I, Section 2 and the Fourteenth Amendment of the Constitution of the United States.

65. The Committee plaintiffs, as salient and cognizable groups, consisting of registered and qualified voters of the State of Maryland, are constitutionally permitted to effectively influence the political process by participating in party deliberations,

slating and nomination of candidates, and registering voters.

66. In enacting HB 10, the General Assembly failed to make any good-faith effort to achieve precise mathematical equality among the congressional districts, and adopted a districting plan unrelated to fair representation in government, purpose drawn in accordance with gerrymandering principles.

67. HB 10 was adopted by exclusive legislative process, and the district lines as drawn are reflective of its discriminatory, arbitrary, and invidious intent to deprive plaintiffs of an opportunity to effectively participate in the political process.

68. The absence of good-faith effort and the discriminatory intent underlying HB 10 are further evidenced by the failure of the General Assembly to consider or adopt other districting plans which were available to it and

which resulted in less deviation from mathematical equality than HB 10, and which were not drawn on the basis of partisan interest, including House Bill 22 submitted by Delegate John Bishop (hereinafter "the Bishop plan"). The Bishop plan had a variance between the largest and smallest districts of 9 persons, and an average deviation between all districts of 2.5 persons. Furthermore, the Bishop plan did not unnecessarily disturb or fragment existing districts, political subdivisions or communities. The Bishop plan is attached hereto and incorporated by reference as Exhibit E.

69. Besides its failure to comply with the constitutional mandate of population equality among Maryland's congressional districts, HB 10 also violates any reasonable and/or neutral criteria applied to the evaluation of otherwise constitutional plans. Such

neutral criteria include the following: creating districts which are contiguous and compact; dividing counties into the fewest fragments necessary; avoiding the splitting of preexisting districts; recognizing communities of common social and economic interests; recognizing shifts in population occurring since 1980, and which will continue to occur throughout the 1990s; preserving the core constituencies of previously existing districts; attempting to pit as few incumbent congressmen as possible against one another in contested elections; and recognizing the right of political groups or associations to effectively influence the political process.

70. Certain of the congressional districts created by HB 10 are laboriously and elaborately twisted, elongated and contrived to such an extreme and excessive degree as to make their

configuration constitute a further deprivation to the residents affected thereby of their right to an equal and meaningful vote in congressional elections, and were devised for partisan purposes and upon motivations which establish the absence of good faith, and constitute an insult to the residents affected thereby (See Article by Tom Bowman, Baltimore Sun, October 25, 1991, attached hereto and incorporated by reference as Exhibit F). Similarly, and with the same effect, certain of the districts created by HB 10 totally evade compactness and divide certain counties into an unnecessarily excessive number of fragments, fail to recognize communities of common social and economic interests, and force incumbent congressmen to run against one another.

71. HB 10 is therefore violative of the constitutional rights of plaintiffs under Article 1, Section 2, the

First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

72. The adoption of HB 10 has and will continue to deny plaintiffs' right to vote and to effectively influence the political process and is further evidence of an effective denial to a minority of voters of a fair chance to influence the political process.

73. The adoption of HB 10 constitutes an arrangement of the electoral system in a manner which will consistently degrade plaintiffs' individual and collective influence on the political a process, as a whole, by a cynical and masked arbitrary and invidious legislative action which at a maximum paid lip service to any constitutional notion of fair and effective representation in government without regard to the will of the voters, but was in furtherance of the deliberate and

arbitrary motives set in motion by a group of incumbent congressmen to create new safe seats and preserve and perpetuate old ones.

74. Accordingly, immediate action by this Court is necessary to ensure that the 1991 congressional elective process, and subsequent elections, are conducted timely and pursuant to a districting plan that meets constitutional requirements. Prompt judicial action is necessary in order to eliminate confusion among potential candidates and voters, and in order to avoid a breakdown in the smooth functioning of the electoral process in the State of Maryland.

WHEREFORE, plaintiffs request that the three-judge court convened to hear this action as required by 28 U.S.C. Section 2284(a):

(a) Declare unconstitutional and contrary to law the eight congressional

districts created by HB 10 in 1991;

(b) Preliminary and permanently enjoin and restrain the Secretary of State of the State of Maryland from receiving or filing nominating petitions for candidates for membership in the House of Representatives for the Primary Election now scheduled for March 3, 1992 in the districts created by HB 10;

(c) Preliminarily and permanently enjoin and restrain defendants from taking any steps toward the nomination of candidates in the Primary Election for the office of member of the House of Representatives in the districts created by HB 10;

(d) Preliminarily and permanently enjoin and restrain defendants from ordering or conducting either the Primary Election scheduled to be held March 3, 1992 until there has been adopted a constitutional plan for reapportionment;

(e) Set an immediate date for a hearing with respect to the aforementioned relief;

(f) Set a deadline of December 1, 1991 by which time a new Redistricting Plan must be passed by the General Assembly of the State of Maryland, signed by the Governor into law, and submitted to this Court for review and approval under this Court's continuing jurisdiction; or, in the alternative, enter an order providing that all interested parties shall submit proposed redistricting plans to this Honorable Court by December 15, 1991; and thereafter by its judgment order into effect such proposed plan as best meets constitutional requirements;

(g) Retain jurisdiction of this action in order to ensure that defendants comply with any congressional redistricting plan promulgated by this Court;

(h) Award plaintiffs their costs and all reasonable attorney's fees and disbursements in connection herewith pursuant to 42 U.S.C. Section 1988; and

(i) Order such other and further relief as may be appropriate.

Respectfully submitted,

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Dated this 12 day of November, 1991.

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No. 91-1514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, *et al.*,

Appellants,

vs.

THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, *et al.*,

Appellees.

REPLY BRIEF TO MOTION TO DISMISS OR AFFIRM

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ARGUMENT I

The issue of "creating a minority voting district" was raised, briefed, argued to and ruled on by the Court below.

On pages 24 and 25 of Appellee's Motion for Summary Judgment below, they state "(1) creating a presently viable voting rights district" ... with a "68.89% minority" population was a justified goal and "clearly articulated" by the Redistricting Committee. They continue, on page 25, "Everyone assumed that failure to create a majority black district would have lead to a lawsuit challenging the plan under the Voting Rights Act. [19]" Footnote 19 stated, "Plaintiffs ... cannot show that it

violated any constitutional provision for the State to create District Four. See United Jewish Organizations v. Carey, 430 U.S. 144, 155 (1977)." Later on page 44 of their Motion, the State again writes that United Jewish Organizations "foreclosed" any attempt "to contest the State's power to draw a minority congressional district" "regardless of whether such redistricting was designed to eliminate the effects of past discrimination." (Emphasis supplied). Then on page 45 the State continued, "United Jewish Organizations involved a State's response to Sec. 5 of the Voting Rights Act Ratner (Sic) than the creation of a minority seat in light of Sec. 2 of the Act. However, this does not warrant a constitutional difference." If any of this is correct, why did the State not

respond substantively to this Court's interpretation of United Jewish (cited by Appellants) in the Bakke decision, that United Jewish "... properly viewed is a case in which the remedy [was] for an administrative finding of discrimination ...", 438 U.S. at 304, 35 (1977); Jur. State. 24. (Emphasis supplied.)

To this, Appellants responded with twelve pages in their Memorandum of Law titled and referred to in their Table of Contents as "Minority District". The sum and substance of these twelve pages was that "race conscious redistricting absent Sec. 5 or discriminatory result under Sec. 2" ... "has never been held constitutional by the Supreme Court and clearly it should not be as it represents a step back from true equality for all people, minority or non-minority and only

serves to foster notions of bigotry and reverse discrimination."

Clearly and beyond all doubt Appellants' Jurisdictional Statement raises no new claim regarding the constitutionality of the state creating a "minority district" absent discrimination. Furthermore, the divided court below clearly considered this issue and one need only read their opinions. The majority ruled that while "the establishment of a majority black district" was not "listed specifically in Karcher ... preserving the strength of racial minority groups was" and that "these aims, however, are clearly within Karcher's ambit." Jur. State. App. 23a. And Circuit Court of Appeals' Judge Niemeyer noted, correctly, "The need to draw representative Hoyer a new district

arose from the perceived need to create a black majority district ..." Jur. State. App. 78a. Judge Niemeyer also noted, during oral argument, regarding the creation of a minority district and whether the votes of white residents who reside in the new minority district would be diluted;

> "that is the famous argument, and it is not played out yet, that affirmative action, while it corrects one form of discrimination, may affect another type".

Finally, in an end run around this issue, Appellees contend that it is Appellants, rather they, who must prove a Sec. 2 Voting Rights Act violation. This is indeed novel. To the contrary, however, Appellants did in fact satisfied

their burden of proof and offered uncontradicted evidence that there was no discrimination present in what is now the minority district and it is equally clear that the State did not and could not show the requisite discrimination necessary to "create" the minority district. However, the plain fact of the matter is the cornerstone of the Act is a showing of discrimination of the type which prevents meaningful participation in the electoral process by a protected class and this burden rests squarely with the State.

Again, pass being novel this unique attempt to shift their clear burden of proof only draws attention to the fact that the state did not and could not respond substantively to the issue that absent discrimination race conscious redistricting has never been held

constitutional.

ARGUMENT II

The issue of "recognizing incumbent representation, with its attendant seniority" and the creation of "safe seats" for incumbents was raised, briefed, argued to and ruled on by the Court below and the individual appellants do have standing.

First, on pages 16 and 17 of Appellants' Memorandum of Law below, the following argument is made. "Furthermore, defendants have not presented any evidence establishing that H.B. 10 was not invidiously created to protect and to create safe seats for congress persons. With specific reference to Congressman Hoyer, Senator

Miller and Speaker Mitchell dispute these allegations while Senator Pica, Delegate Bishop and Chris Griffen (Congresswoman Bently's Aide) indicate that it was "common knowledge" that there was to be a safe seat for Congressman Hoyer and that other districts were drawn to protect or assure the election of the other congress persons. See Pica Dep. at page 51. See also Exhibit 2 P.G. Journal 6-25-91. While the members of the legislature may have been convinced that safe seats were necessary to protect incumbents neither the constituents or residents statewide were. (Exhibit 3, Mason Dixon Pole in P.G. Co. Journal of 9-4-91.) Continuing on this same page, Appellants continued their argument that "under H.B. 10, Congressman McMillen and Gilchrest must run against one another in the First

Congressional District. The reason for this is clear: ability aside, See Miller Dep. at pg. 57-58, these incumbents are lowest on the totem pole of congressional seniority. Finally, the alternative plan H.B. 22, persevered the cores of all eight former congressional districts, avoided contests between incumbents, and more closely approximated population."

Furthermore, Judge Smalkin noted in the Majority Opinion "the evidence, as the dissent states, shows that the General Assembly, inter alia, aimed to give Congressman Hoyer, a congressman with high ranking and importance in the Federal House of Representatives a "safe seat" to provide the majority black population ... with a chance to choose a representative without requiring that person to run against a strong incumbent

such as Congressman Hoyer, and to provide certain opportunities for Congressman Bently and Congressman Cardin." Jur. State. App. 22a and 23a.

Also, Circuit Judge Niemeyer held in his Dissenting Opinion that "in light of this evidence I find that the State did not use neutral criteria to establish its eight congressional districts. Instead, the driving force behind the placement of the new district boundaries was a desire to promote the election bids of certain incumbent representatives at the expense of other less senior incumbents. The Constitution gives to the voters of Maryland a right to make their own choices about re-electing their present Congressman to represent them again in Congress. The State's attempt to defeat that right by manipulating district lines

either by unnecessarily pitting incumbents against one another or by enhancing the prospects of one candidate over another cannot be reconciled with Article I, Sec. 2 and Wesberry" Jur. State. App. 81a and 82a.

Finally, Appellants incredulous notion that because "no member of Maryland's Congressional Delegation" is a party to this case that Appellants do not have standing to raise the issue of the State of Maryland's unconstitutional classification of congressional representatives on the basis of their seniority, is inconsistent with the fundamental understanding and meaning of representative government, as any right a U.S. Representative has is derived from "the people". Nonetheless, this transparent avoidance of answering

Appellants substantive argument on this issue is quickly and fatally treated by the following quoted text of White v. Weiser, 412 U.S. 783, 786 (1973). "On October 19, 1971, Appellees, residents (emphasis supplied) of the 6th, 13th, 16th and 19th congressional districts filed suit in the United States District Court for the northern district of Texas against Appellant, The Secretary of the State of Texas and the Chief Election Officer of the State. Appellees alleged that the reapportionment of the Texas Congressional Seats is embodied in S.B. 1 violated their rights under Art. I, Sec. 2 and the Equal Protection Clause of the Fourteenth Amendment."

Clearly and without any doubt Appellants did raise this issue below and do have standing to raise it on Appeal.

ARGUMENT III

When a State arranges the electoral process to achieve political ends or allocate political power their acts are not exempt from judicial scrutiny either under White v. Weiser or Gaffney v. Cummings.

The States' erroneous contention that this Court should defer to the will of a legislature and their political considerations contained in a congressional redistricting plan is a misreading of the clear meaning of Kirkpatrick v. Pressler, 394 U.S. 526 (1969), White v. Weiser, 412 U.S. 783 (1973), Karcher v. Daggett, 462 U.S. 725 (1982), and Gaffney v. Cummings, 412 U.S. 735 (1973). A correct reading of these

cases stands for a common mandate - that this Court is willing to defer to State legislative policies in congressional redistricting, "so long as they are consistent with Constitutional norms", Karcher at 740, "not ... vulnerable to legal challenge", Weiser at 797, as when attempting to draw districts of equal population "the rule is one of practicability rather than political practicality," Preisler at 533. Furthermore, a correct reading of Gaffney, (a state legislative redistricting case ~~not~~ subject to the stricter requirements inherent in congressional redistricting) also holds that even though districts are perfectly acceptable under equal population standards, "We must respond ..., to Appellees claims in this case" that "a

political fairness principal was followed ..." for "What is done in so arranging of elections to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment", 412 U.S. at 751, 754 (1973).

Thus it is not, as Appellees suggest, "preposterous" to contend that political considerations may well and often do violate Article I, Sec. 2 or other constitutional mandates.

Also, as this Court stated in Roman v. Sincock, 377 U.S. 695, 710, "the Constitution permits such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." How can race conscious redistricting, absent discrimination, and

preferential treatment of senior congressmen in redistricting be anything but "arbitrary" or "discriminatory"?

CONCLUSION

Appellees failure to respond in a substantive manner to the substantial questions presented by Appellants' Jurisdictional Statement should further serve to emphatically point out the validity of what Fourth Circuit Court of Appeals Judge Paul V. Niemeyer concluded - "I would not permit an election to proceed on the basis of H.B. 10" Jur. State. App. 82a.

For the above further reasons, this Court should note probable jurisdiction and expeditiously reverse the judgment of the District Court.

Respectfully submitted,

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